89- 1518

No. ___

In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seizure of property in order to satisfy a judgment, without giving the property owners a meaningful prior opportunity to assert valid claims that much of the seized property is exempt from execution under state law, is immune from due process scrutiny on the ground that the state provides adequate postdeprivation remedies.

2. Whether a county, and the Sheriff and Deputy Sheriff of that county in their official capacities, can escape liability for a Fourth Amendment violation occurring in the course of carrying out a writ of execution, even though the decision to break into petitioners' home without legal authority was made by the officials with policymaking power with respect to the carrying out of such writs.

3. Whether a private law firm is entitled to escape respondeat superior liability in an action under 42 U.S.C. § 1983, despite state law providing for respondeat superior liability.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are Kenneth G.M. Mather and Brian Harjo Watson. The original plaintiffs in this action were M. Frank Watson and Betty L. Watson on behalf of themselves and their then-minor son Brian. During the pendency of this litigation in the district court, Mr. and Mrs. Watson filed for bankruptcy, and Brian Watson attained the age of majority. Thus, the Watsons' bankruptcy trustee and Brian Watson became the plaintiffs. See App., *infra*, 2a n.1. Mr. Mather is the current bankruptcy trustee for the Watsons.

Respondents, defendants below, are Bill Weaver; Tom Newton; Andrew S. Hartman; Andrew S. Hartman, P.C.; Barkley, Rodolph, White & Hartman; S & T Gas Transmission Company, Inc.; John Doe; Jane Doe; and the Board of Commissioners of Okmulgee County, Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Kenneth G.M. Mather, as trustee of the estate in bankruptcy of M. Frank Watson and Betty L. Watson, and Brain Harjo Watson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported. The opinions of the district court (App., *infra*, 5a-7a and 8a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1989. Petitions for rehearing were denied in part and granted in part on November 28, 1989 (App., *infra*, 13a-14a and 15a-17a). On February 26, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including March 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Respondent Andrew Hartman is a partner in the law firm Barkley, Rodolph, White & Hartman, which is also a respondent. On behalf of his client S & T Gas Transmission Company (also a respondent), Hartman won a judgment of $141,787.21 against petitioners in Oklahoma state court.[1] That judgment eventually was reduced on appeal to $1, but respondents rushed to satisfy the six-figure judgment by obtaining a writ in aid of execution before the appellate proceedings ran their course.

Oklahoma law exempts from judgment creditors much of the personal property that Hartman sought to confiscate. Before petitioners' valid exemption claims could be adjudicated, however, Hartman and respondent Tom Newton, a Deputy Sheriff of Okmulgee County, Oklahoma, broke into the Watsons' home and carted off two truckloads of their property.[2] Those actions were taken at the orders of respondent Bill Weaver, the Sheriff of Okmulgee County, and Tom Giulioli, the District Attorney for Okmulgee County.

Petitioners filed suit under 42 U.S.C. § 1983 against Hartman, the law firm, S & T, the Sheriff and Deputy

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[1] Petitioner Mather represents the interests of the Watson family (see p. ii, *supra*), and we will refer to the Watsons as "petitioners."

[2] Oklahoma law does not allow forcible entry into a dwelling house in aid of execution. The district court so recognized. App., *infra*, 9a; see also Restatement (Second) of Torts § 208(2) & comment k (1965); 3 W. Blackstone, *Commentaries* *414-417; *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 11 E.R.C. 628 (1603).

Sheriff, the county,[3] and others who had participated in the break-in. Petitioners alleged that respondents' actions violated their rights under the Due Process Clause of the Fourteenth Amendment and the Fourth Amendment. The due process claims against all defendants were dismissed, as were the Fourth Amendment claims against all defendants other than Hartman and the Sheriff and Deputy Sheriff in their individual capacities only. This petition challenges the dismissal of the due process claims and the dismissal of the Fourth Amendment claims against the county, the individuals in their official capacities, and the law firm.

A. The Judgment Notwithstanding the Verdict

In early 1986, Hartman and his law firm litigated a breach-of-contract claim in Oklahoma state court against the Watsons on behalf of S & T. Complaint 3; App., *infra*, 5a. The jury found for S & T but awarded a verdict of only $1. *Ibid.* The trial judge, however, granted a motion for judgment notwithstanding the verdict, awarding S & T $85,244.11 plus $16,478.97 interest and awarding the law firm $40,064.13 in attorney's fees. *Ibid.* Subsequently, the Oklahoma Court of Appeals reversed the trial court's order and reinstated the original $1 jury verdict. *S & T Gas Transmission Co. v. Watson*, No. 66528 (Okla. Ct. App. Feb. 16, 1988), cert. denied, No. 66528 (Okla. July 13, 1988).

B. The Collection Proceedings

During the pendency of petitioners' appeal, Hartman and his law firm instituted collection proceedings.

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[3] Oklahoma law provides that a county shall be sued in the name of its Board of County Commissioners. See Okla. Stat. tit. 19, § 4 (1988).

Complaint 3; App., *infra*, 5a-6a. Accordingly, on December 10, 1986, an assets hearing was held before a state trial judge, Judge Thompson, in Creek County. Complaint 3. At that hearing, petitioners refused to answer questions about certain contents of their home, claiming that this property was exempt from judgment creditors under Okla. Stat. tit. 31, § 1 (1990 Supp.). Complaint 3. Judge Thompson did not rule on that claim but ordered the hearing continued to December 17, 1986.

Before the hearing before Judge Thompson could be resumed, however, and thus before the Watsons' exemption claim was considered, Hartman obtained a writ in aid of execution from a different judge, Judge Maley, in a different county, Okmulgee County. App., *infra*, 5a-6a. An assets hearing is not a prerequisite to a writ of execution under Oklahoma law, and Oklahoma law does not require that exemption claims be adjudicated before the property at issue is seized. Thus, on December 12, 1986, Judge Maley signed a writ providing that "you are hereby commended [*sic*] to forcibly go upon the premises of said individuals and execute upon the personal property enumerated at Exhibit 'A' to this Writ." App., *infra*, 6a.

As required by statute (Okla. Stat. tit. 12, § 731 (1988)), Judge Maley "directed" the writ to Sheriff Weaver, who was then responsible for "serv[ing] and execut[ing it] according to law." Okla. Stat. tit. 19, § 514 (1988). Sheriff Weaver "order[ed]" Deputy Sheriff Newton to proceed to the Watsons' home and execute the writ. Newton Depo. 17.[4] Consistent with county policy,

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[4] "Depo." citations are to the pretrial depositions that were taken in the Section 1983 action. The district court improperly granted summary judgment to all defendants, including defendants who had not moved for summary judgment (see App., *infra*, 11a), without even waiting for all of the pretrial depositions to be transcribed.

Newton did not attempt to inform the Watsons that he would be coming. *Id.* at 23. When Newton, in the company of Hartman, arrived at the Watsons' house, there was nobody home and the premises were locked. *Id.* at 24. Newton was unsure whether the writ authorized him to break into the Watsons' house. See Weaver Depo. 19, 36.[5] Accordingly, Newton radioed in to Sheriff Weaver "for further instructions." Newton Depo. 26.

As was the "procedure" and "policy" (Weaver Depo. 10, 16), Sheriff Weaver "told [Newton] that [he] would get ahold of the district attorney * * * and see if [he] could get the answers to [Newton's] questions." Weaver Depo. 36; see also *id.* at 11, 17, 19. See generally Okla. Stat. tit. 19, § 215.5 (1988) (requiring District Attorneys to give "opinion and advice" to other county officers).[6] The District Attorney told Sheriff Weaver that Newton "could enter the dwelling house forcibly and execute it." Weaver Depo. 40. Sheriff Weaver then asked "about lawsuits," and the District Attorney replied that "you've got to do what the judge says" and that "[y]ou may get sued, but either way, you know, we've been sued before." *Ibid.*

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[5] As noted, the writ provided merely that "you are hereby commended [*sic*] to forcibly go upon the premises." The Watsons, however, live on an 80-acre tract surrounded by a high fence, and it is unclear whether the writ on its face authorized forced entry into the dwelling house or simply onto the property. See Weaver Depo. 19-23. As the district court subsequently observed, "[t]he Oklahoma statutes dealing with execution by creditors do not provide for breaking into the debtor's home." App., *infra*, 9a (citation omitted).

[6] The district court appears to have believed that Sheriff Weaver consulted only with an assistant district attorney. See App., *infra*, 10a. That belief, however, is clearly incorrect. See, *e.g.*, Weaver Depo. 19; Giulioli Depo. 4; see also note 4, *supra*.

Sheriff Weaver then "told [Newton] that [he] had talked to the district attorney * * * and that he told us to go ahead and do it." *Ibid.* See also Newton Depo. 27 (Sheriff Weaver got instructions "from the district attorney's office" and "advised me to enter the * * * dwelling").

Newton accordingly unscrewed the catch on the door and entered the Watsons' house. Newton Depo. 27-28. He and Hartman proceeded to fill two pickup trucks with personal property (Complaint 5), including guns, saddles, bridles, televisions, stereos, videocassette recorders, a microwave oven, rugs, and assorted clothing. The District Attorney then "instructed" Sheriff Weaver to hold these goods in storage "until it was settled in court." Weaver Depo. 32-33.[7] Shortly thereafter, the Watsons filed for reorganization in bankruptcy under Chapter 11.

C. Proceedings Below

Petitioners brought this action, alleging that the carrying out of the writ of execution deprived them of property without due process of law and that the breaking into their home violated their rights under the Fourth Amendment. Complaint 5. The United States District Court for the Eastern District of Oklahoma granted summary judgment in favor of all defendants. App., *infra*, 5a-7a, 8a-12a. It held first that because the deprivation of property had been postjudgment, there had been *"per se"* no denial of due process. App., *infra*, 9a. Second, it reasoned that petitioners had failed to state a cause of action

[7] After the Oklahoma Court of Appeals reinstated the original jury verdict, most – but not all – of this property was returned to the Watsons. Some of it, however, had been damaged.

for violation of the Fourth Amendment because, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), Section 1983 affords no remedy for any constitutional violation if that violation was "random and unauthorized" and if state-law remedies exist. App., *infra*, 10a & n.1. Despite the role played by the Sheriff and District Attorney, the District Court concluded that the breaking and entering alleged here was "random and unauthorized" because "no law or regulation permit[s] entry into a home in execution of a judgment" and because the District Attorney is required by state law only to provide "opinion and advice." *Id.* at 10a-11a.

The Tenth Circuit reversed only as to petitioners' Fourth Amendment claims against Weaver and Newton in their individual capacities, and against Hartman. App., *infra*, 1a-4a, 16a. Without making any determination as to whether the deprivation of property was random or unauthorized, the court of appeals held that *Parratt* bars petitioners' due process claims because Oklahoma law provides postdeprivation tort remedies. App., *infra*, 3a. It held, however, that *Parratt* does not apply to petitioners' Fourth Amendment claims, and that the case could proceed on that theory against Weaver, Newton, and Hartman. *Id.* at 3a, 16a. The court of appeals did not explain the basis for its ruling that Okmulgee County and the law firm could not be sued for violation of the Fourth Amendment. See *id.* at 3a.

REASONS FOR GRANTING THE PETITION

Petitioners have valid claims that respondents violated their rights under the Due Process Clause; that the county should be liable, and respondent individuals

should be liable in their official as well as individual capacities, for a Fourth Amendment violation that reflects the exercise of policymaking authority delegated by the county; and that respondent law firm should be liable under the Oklahoma law of respondeat superior. In rejecting each of those claims, the Tenth Circuit placed itself in conflict with the decisions of this Court, with the decisions of other courts of appeals, and with the general rule that Section 1983 incorporates relevant principles of state law. This Court should grant certiorari to consider the serious errors committed by the Tenth Circuit and the important issues of Section 1983 law raised by this case. Because one of the cases that demonstrate the errors committed below (*Zinermon v. Burch*, 58 U.S.L.W. 4223 (Feb. 27, 1990)) was decided after the Tenth Circuit ruled, the Court may wish to consider remanding for further consideration in light of that case.

I. THE TENTH CIRCUIT'S DISMISSAL OF THE DUE PROCESS CLAIMS CONFLICTS WITH THIS COURT'S DECISIONS IN *LOGAN V. ZIMMERMAN BRUSH CO.* AND *ZINERMON V. BURCH* AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Due Process Clause "usually * * * requires some kind of a hearing *before* the State deprives a person of * * * property." *Zinermon*, 58 U.S.L.W. at 4227 (emphasis in original). The necessary predeprivation hearing did not occur in this case, however. Not only was the Watsons' property physically seized in execution of a judgment that was ultimately overturned on appeal, but also the seizure took property that was exempt from execution under Oklahoma law. Despite the Watsons' valid exemption claims, Oklahoma law does not provide, and the

Watsons did not receive, any meaningful opportunity to assert those claims before their home was invaded and two truckloads of furniture and personal items, including exempt property, were carted away.

The relevant statute (Okla. Stat. tit. 31, § 1 (1990 Supp.)) provides that most furnishings and other personal belongings are "exempt from * * * execution." The Watsons in fact claimed that exemption at a preliminary assets hearing. Judge Thompson did not rule on that claim, but instead decided to consider the issue further at a continued assets hearing at a later date.

That hearing never occurred. In the interim, Hartman sought and obtained an ex parte writ of execution from Judge Maley. As required by statute, Judge Maley "directed" the writ to Sheriff Weaver. Okla. Stat. tit. 12, § 731 (1988). As similarly required, Sheriff Weaver was responsible for "serv[ing] and execut[ing it] according to law." Okla. Stat. tit. 19, § 514 (1988).[8] But Oklahoma law *nowhere* requires that the Sheriff take a claimed exemption into account in any way; instead " 'it is no part of the duty * * * of an officer holding an execution, to select and set apart the judgment debtor's exempt property.' " *Sale v. Shipp*, 160 P. 502, 504 (Okla. 1915) (quoting *Parsons v. Evans*, 145 P. 1122 (Okla. 1914)). Accordingly, Hartman and Deputy Sheriff Newton, acting on "instructions" (Weaver Depo. 32-33) from Sheriff Weaver and the District Attorney for Okmulgee County, indiscriminately

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[8] The sheriff or his deputies are additionally responsible for implementing many of the procedural safeguards provided by Oklahoma execution law. See, *e.g.*, Okla. Stat. tit. 12, §§ 756, 757, 759, 811 (1988).

seized the contents of the Watsons' home without regard to their earlier objections.

The Tenth Circuit determined that this Court's decision in *Parratt v. Taylor, supra,* precluded any Section 1983 liability in this case for denial of due process. App., *infra,* 3a. In *Parratt,* the Court held that a "random and unauthorized" deprivation of property does not constitute a due process violation if a postdeprivation state remedy is available. 451 U.S. at 541. Without making any express determination that the events described above were in fact "random and unauthorized," the court below dismissed petitioners' due process claims simply because "an adequate state law remedy" existed. App., *infra,* 3a.[9]

The Tenth Circuit's interpretation of *Parratt* is indefensible in light of two of this Court's subsequent cases clarifying that decision. The court of appeals failed to recognize that a property deprivation undertaken pursuant to an established state procedure – which is the case here – cannot be excused from due process scrutiny on the ground that the State also provides a postdeprivation remedy. The court also did not determine – and could not properly have determined – that the deprivation of petitioners' property was "random and unauthorized."

A. To begin with, the decision below ignores the teachings of *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). In that case, the Court allowed a due process

[9] The district court held that no due process violation had occurred because the execution was postjudgment. App., *infra,* 9a. But this misses the point of petitioners' claim – by virtue of Okla. Stat. tit. 31, § 1 (1990 Supp.), the Watsons have a right to retain much of the property seized despite the previous judgment against them.

challenge to a statutory scheme that permitted a complainant to assert a property interest before a state agency and required the agency to act within a stated period of time, but extinguished that property interest if the agency for any reason let the period run without acting. The Court rejected the proposition that *Parratt* applied to such a challenge: "[u]nlike the complainant in *Parratt*, Logan is challenging not [a random and unauthorized act by a state employee], but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." 455 U.S. at 435-436 (quoting *Parratt*, 451 U.S. at 541).

Like the due process violation in *Logan*, the violation in this case arises from an "established state procedure." Oklahoma has created an entitlement by providing that certain property is exempt from executions but has established no procedures by which the owner can assert that entitlement before the property is seized. See p. 10, *supra*. Thus, it is established procedure in the State for overbroad execution on a judgment to occur, with the valid exemptions available only for later assertion. This lawsuit calls that established procedure into question, yet the lawsuit has been dismissed on the nonsensical ground – contrary to *Logan* – that the availability of postdeprivation remedies removes the need even to consider the constitutionality of the absence of any predeprivation remedies.

If the Tenth Circuit meant to rule, sub silentio, that the deprivation in this case did not result from an "established state procedure," then it put itself into conflict with the decisions of other courts of appeals. In cases much closer than this one, those courts have held that a due process violation is attributable to an "established

state procedure" whenever predeprivation process is feasible or practical. For example, in *Augustine v. Doe*, 740 F.2d 322, 327-329 (5th Cir. 1984), the court reversed a grant of summary judgment in favor of deputy sheriffs and others who allegedly had deprived the plaintiff of procedural due process by arresting and detaining him without probable cause and taking his dog. The court held that the "controlling question" was whether the State was in a position to provide predeprivation procedures (*id.* at 327) and that, if it was, then the deprivation could be ascribed to an "established state procedure" within the meaning of *Logan* (*id.* at 329). See also *Thibodeaux v. Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984). Likewise, in *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983), the court reinstated a procedural due process claim brought by a plaintiff who alleged that buildings she owned had been demolished without prior compliance with the Administrative Code of the City of New York. The district court had dismissed the due process claim on the basis of *Parratt*, but the court of appeals held that the "established state procedure" analysis derived from *Logan* was more appropriate because "decisions made by officials with final authority over significant matters, which contravene the requirements of a written * * * code, can constitute established state procedure." *Id.* at 988.

Consistent with those decisions of the Second and Fifth Circuits, other federal appellate decisions have held that the *Logan* "established state procedure" analysis is applicable whenever predeprivation process is feasible. See *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1455 (11th Cir. 1985) ("we conclude that the rationale underlying the 'established state procedure' exception is that where a

deprivation occurs pursuant to an established state procedure, predeprivation process is ordinarily feasible"), cert. denied, 475 U.S. 1014 (1986); *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) ("*Parratt's* 'established state procedure' exception was intended to apply only where the procedure deprives the claimant of predeprivation process it would otherwise be possible to provide"); see also *Greco v. Guss*, 775 F.2d 161, 171 (7th Cir. 1985).

In this case, predeprivation process was certainly feasible. Indeed, the State was in the midst of providing it when the writ of execution was issued. Moreover, in this case, as in *Burtnieks*, those who have the responsibility under Oklahoma law for carrying out writs of execution are permitted and even encouraged to make decisions that take property in direct contravention of the State's written code. Thus, under the interpretation of *Logan* that prevails in other circuits, petitioners would be able to proceed with a Section 1983 action.

B. The inapplicability of *Parratt* to this case is confirmed by this Court's intervening decision in *Zinermon v. Burch*. Because the Tenth Circuit did not have the benefit of the *Zinermon* decision when it ruled, this Court may wish to grant the petition, vacate the judgment below, and remand for reconsideration in light of that case.

Zinermon involved the issue in between those resolved in *Parratt* and *Logan*: whether a Section 1983 action exists for due process violations when the state procedure was not itself "inadequate to ensure due process" but when the State nonetheless had given officials "broadly delegated, uncircumscribed power to effect the deprivation at issue." 58 U.S.L.W. at 4230. The Court held that a Section 1983 action can be maintained in that intermediate situation. It reasoned that the State by definition

cannot predict when a "random and unauthorized" deprivation such as that in *Parratt* will occur; therefore, *Parratt* "represent[s] a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." 58 U.S.L.W. at 4228 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). By contrast, when "predeprivation procedural safeguards *could* address the risk of deprivations of the kind * * * allege[d]," the *Parratt* rule does not apply. *Id.* at 4229 (emphasis added).

The Court identified three characteristics indicating why predeprivation process would have been effective. First, the deprivation was foreseeable – "[a]ny erroneous deprivation w[ould] occur, if at all, at a specific, predictable point in the * * * process." 58 U.S.L.W. at 4230. Second, predeprivation process was not "impossible." *Ibid.* Third, the officials' actions were authorized – "[t]he State delegated to them the power and authority to effect the very deprivation complained of * * * and also delegated to them the concomitant duty to initiate the [relevant] procedural safeguards." *Ibid.*

Even if the violation alleged here did not arise from an established state procedure, it plainly involves the sort of deprivation by officials acting pursuant to delegated power that "predeprivation procedural process could address." As in *Zinermon*, the deprivation was foreseeable – it would occur, if at all, when a writ of execution was served after an exemption was claimed. Similarly, predeprivation process was possible; in fact, the State was in the middle of providing a hearing when the deprivation occurred. And last, Oklahoma authorized the Sheriff's actions by delegating him the responsibility to "serve and

execute" the writ (Okla. Stat. tit. 19, § 514 (1988)) and to administer the procedural safeguards set up by state law (see note 8, *supra*).

The Court recently has vacated the judgments, and remanded for reconsideration in light of *Zinermon*, in two Section 1983 actions in which allegations of due process violations by high-ranking officials acting pursuant to broadly delegated authority had been dismissed on the basis of *Parratt*. See *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989) (en banc), vacated, 58 U.S.L.W. 3564 (March 5, 1990); *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988), vacated, 58 U.S.L.W. 3564 (March 5, 1990). The Court should, at a minimum, do likewise here.

II. THE TENTH CIRCUIT'S PARTIAL DISMISSAL OF THE FOURTH AMENDMENT CLAIMS, WITHOUT ADEQUATE CONSIDERATION OF THE ABILITY OF RESPONDENT OFFICIALS TO SET COUNTY "POLICY," IS INCORRECT AND RAISES ISSUES THAT ARE BADLY IN NEED OF CLARIFICATION BY THIS COURT.

Although a local government may not be subjected to vicarious liability under Section 1983 "for an injury inflicted solely by its employees or agents," it is well settled that it may be held accountable for a constitutional tort attributable to its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); accord *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-122 (1988) (plurality opinion). Such a "policy or custom" can manifest itself in several ways. See, *e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986) (written rule or regulation); *Monell*, 436 U.S. at 661 n.2 (same); *City of Canton v. Harris*,

109 S. Ct. 1197, 1204 (1989) (inadequate supervision of employees); *Praprotnik*, 485 U.S. at 127 (plurality opinion) ("a widespread practice that, although not authorized by written law * * *, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law' ").

This case concerns the situations in which official policy may flow from "a single decision to take unlawful action made by * * * the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-484 (plurality opinion); accord *Jett v. Dallas Independent School Dist.*, 109 S. Ct. 2702, 2723 (1989); *Praprotnik*, 485 U.S. at 124 (plurality opinion). Last Term, the Court achieved a consensus on the *method* by which lower courts are to determine whether such actions may subject the local government to Section 1983 liability; thus, it is now clear that whether the official was delegated the required "final policymaking authority" with respect to the challenged action is "a legal question to be resolved by the trial judge" on the basis of state law "*before* the case is submitted to the jury." *Jett*, 109 S. Ct. at 2723 (emphasis in original).

But the Court has not provided clear guidance on the question of *what* may constitute "final policymaking authority" in the first place, beyond stating that it is a matter of state law (see, *e.g.*, *Jett*, 109 S. Ct. at 2723). In *Pembaur*, for example, a five-Justice majority agreed that a county prosecutor authorized to give "instructions" was a final policymaker, but implied that its conclusion might have been different had the prosecutor given only "legal advice." 475 U.S. at 484-485.[10] Similarly, in *Praprotnik*,

[10] Moreover, one member of the majority opined that the prosecutor would not have had the requisite authority to set

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seven Justices agreed that a municipal employee did not have final policymaking authority, but disagreed over the rationale. Compare 485 U.S. at 130 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) (focusing on existence of procedures for review) with 485 U.S. at 138-139, 141 & n.4 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment) (disagreeing with the plurality's view of the effect of procedures for review and arguing instead that no final policymaking authority was delegated to the employee in question because many other municipal employees had similar power). Most recently, in *Jett*, the Court declined to reach the question at all. See 109 S. Ct. at 2724. As one lower court recently lamented, "[i]t is clear that we simply have no definitive holding upon which to rely in deciding where to look for the placement of policymaking authority." *City of Houston v. DeTrapani*, 771 S.W.2d 703, 707 (Tex. Ct. App. 1989).

In the absence of guidance from this Court, the lower courts have come into conflict over which local officials are "final policymakers." And because local officials – but not local governments – are frequently shielded from monetary liability by qualified immunity (see, *e.g.*, *Owen v. City of Independence*, 445 U.S. 622 (1980)), the latter have a powerful incentive to shift de facto decisionmaking

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government policy had the unconstitutionality of his "instructions" been settled at the time. 475 U.S. at 486 (White, J., concurring). Another member stated his view that policymaking authority is not necessary for governmental liability because the aspect of *Monell* that rejected vicarious liability was wrongly decided. *Id.* at 489 (Stevens, J., concurring in part and concurring in the judgment).

power down the bureaucratic ladder while adopting no written policy or retaining on the books a "precatory admonition" against unconstitutional action. See *Praprotnik*, 485 U.S. at 145 n.7 (Brennan, J., concurring in the judgment); cf. *id.* at 130-131 (plurality opinion). In that way, the local government might be able to dissociate itself from its employee's actions, thereby most probably leaving the plaintiff without a federal remedy.

The decision below provides an example of this unfair phenomenon. Without providing any reason, the Tenth Circuit simply dropped Okmulgee County from the case (App., *infra*, 3a), even though its Sheriff and District Attorney instructed one of its Deputy Sheriffs to break into the Watsons' home and seize much of its contents, and even though their decision on the matter was not subject to any higher review by county authorities. The Court should grant the petition for a writ of certiorari to clarify further the circumstances in which a local government may be held accountable for constitutional violations committed at the behest of its officials acting pursuant to delegated authority.

A. The Tenth Circuit's Disposition Is Inconsistent with this Court's Decision in *Pembaur*.

In *Pembaur*, this Court held that a local government official exercised final policymaking authority and that the local government was therefore liable for his actions on facts almost identical to those presented here. There, county deputy sheriffs attempted to serve capiases for the arrest of third parties at Pembaur's office. See 475 U.S. at 472. Pembaur refused to let the deputies in, and they called their supervisor for instructions. See *id.* at 472-473.

The practice in the Sheriff's Department was to refer questions concerning the service of capiases to the county prosecutor for "instructions." 475 U.S. at 473. That practice was founded on a state statute providing that county officers may " 'require . . . instructions from [the County Prosecutor] in matters connected with their official duties.' " *Id.* at 485 (quoting Ohio Rev. Code Ann. § 309.09(A) (1979)). Accordingly, the supervisor told the deputies to contact the County Prosecutor's office and follow its "instructions." *Id.* at 473. This, the Sheriff later testified, "was the proper thing to do." *Id.* at 475. The County Prosecutor and his assistant "instruct[ed] the Deputy Sheriffs to 'go in and get [the witnesses].' " 475 U.S. at 473. Accordingly, the deputies broke down the door and entered. *Ibid.* This Court subsequently held in another case that such a search violates the Fourth Amendment. See *id.* at 474.

The Court concluded that the county could be held liable for the prosecutor's decision. Looking to the state law and the Sheriff's stated practice, the Court held that the prosecutor's instructions represented official policy because "[i]n ordering the Deputy Sheriffs to enter petitioner's [office] the County Prosecutor was acting as the final decisionmaker for the county." 475 U.S. at 485.[11]

If anything, this case presents an even stronger case for a finding of "final policymaking authority" than did

[11] The Court rejected the county's argument that the prosecutor was not acting as a final policymaker because he was giving only "legal advice." It did not decide whether the giving of such advice could constitute policymaking, but determined instead – based on the state statute and the Sheriff's practice – that the prosecutor's decision was more "command[]" than advice. 475 U.S. at 484.

Pembaur. When Deputy Sheriff Newton found the Watsons' door locked and no one home, he called Sheriff Weaver "for further instructions." Newton Depo. 26. Sheriff Weaver then invoked his "policy" (Weaver Depo. 16) in such situations – "get[ting] ahold of the district attorney * * * and see[ing] if I could get the answers." *Id.* at 36; see also *id.* at 10-11, 17, 19 (discussing the Sheriff's procedure of going to the District Attorney for "instructions" and "advice"). The District Attorney told Sheriff Weaver that Newton "could enter the dwelling house forcibly and execute" the writ (*id.* at 40), and the Sheriff then "told [Newton] that [he] had talked to the district attorney * * * and that he told us to go ahead and do it." *Ibid.*; see also Newton Depo. 27 (Sheriff Weaver got instructions "from the district attorney's office" and "advised me to enter the * * * dwelling").

Thus, as in *Pembaur*, the Sheriff had a practice of requesting – and following – the local prosecutor's instructions on how to serve process. And Oklahoma law, like Ohio law, contemplates such a relationship, providing that "[t]he District Attorney * * * shall give opinion and advice to * * * civil officers * * * relating to the duties of such * * * officers." Okla. Stat. tit. 19, § 215.5 (1988).[12]

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[12] The district court sought to distinguish *Pembaur* on the ground that the Ohio statute used the term "instructions" instead of "opinion and advice," and that the *Pembaur* Court implied that "legal advice" by the prosecutor might not have bound the county. App., *infra*, 11a. Whatever the propriety of making recovery under Section 1983 turn on such metaphysics, Sheriff Weaver's and Deputy Sheriff Newton's testimony make clear that their policy was to regard what the District Attorney told them as far more than mere "advice." See pp. 6-7,

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Consequently, Okmulgee County may properly be held liable for the District Attorney's actions.

But equally important, and as was not the case in *Pembaur*, the *Sheriff* also "advised [Newton] to enter the * * * dwelling." Newton Depo. 27. Under Oklahoma law, the county Sheriff is explicitly charged with "serv[ing] and execut[ing] * * * all process, writs * * * and orders." Okla. Stat. tit. 19, § 514 (1988). The Sheriff is thus expressly authorized to "act[] as the final decisionmaker for the county" with respect to service of process, and his actions therefore represent official county policy. *Pembaur*, 475 U.S. at 485; see also *Praprotnik*, 485 U.S. at 127 (plurality opinion) (officials with "authority to make *final* policy" may "make municipal policy") (emphasis in original).

B. The Circuits Are in Conflict Regarding Whether Sheriffs and Prosecutors Exercise Policymaking Authority in Carrying Out Their Law Enforcement Responsibilities.

"Identifying the official policymakers has been an intellectual fork along the path of development of section 1983 jurisprudence." *Hammond v. County of Madera*, 859 F.2d 797, 802 (9th Cir. 1988). The Tenth Circuit's disposition of this case reflects the truth of that observation. It adds to a disagreement among the circuits with respect to governmental liability for the constitutional violations committed by sheriffs and local prosecutors during the course of their law enforcement activities. The division

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supra. In such situations, "[t]he delegation of authority [should not be overlooked] by disingenuously labeling the Prosecutor's clear command mere 'legal advice.' " *Pembaur*, 475 U.S. at 485.

over this frequently recurring issue warrants this Court's review.

At least four circuits have held that a Sheriff or prosecutor has final policymaking authority with respect to law enforcement. See *Crowder v. Sinyard*, 884 F.2d 804, 827-829 (5th Cir. 1989) (county liable for sheriff's authorization of an unconstitutional search and seizure); *Gobel v. Maricopa County*, 867 F.2d 1201, 1206-1209 (9th Cir. 1989) (county could be held liable for district attorney's decisions as to warrant procedure); *Weber v. Dell*, 804 F.2d 796, 803 (2d Cir. 1986) (county liable for sheriff's policy of strip searches of inmates); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (county liable for sheriff's policy of strip searches of visitors); *Crane v. Texas*, 759 F.2d 412, 430 (5th Cir.) (county liable for district attorney's institution of unconstitutional capias procedures), modified on other grounds, 766 F.2d 193, cert. denied, 474 U.S. 1020 (1985). See also *Meade v. Grubbs*, 841 F.2d 1512, 1530 (10th Cir. 1988) (Oklahoma county liable for sheriff's alleged approval of use of physical force on inmates), cert. denied, 483 U.S. 1020 (1987); *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988) (county liable for sheriff's violence towards inmates); *Haynesworth v. Miller*, 820 F.2d 1245, 1274 (D.C. Cir. 1987) (city could be held liable for retaliatory prosecution by district attorneys). By contrast, in addition to the court below, the Sixth Circuit has refused to ascribe a police chief's actions to the local government he served, reasoning that there was "[n]o evidence that [he] possessed any final authority to establish municipal policy." *Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822, 828-829 (no county liability for allegedly unconstitutional arrest by sheriff), cert. denied, 109 S. Ct. 529 (1988).

Of course, as the inquiry is one of state law (*Jett*, 109 S. Ct. at 2723), each case is somewhat dependent on the state statutes at issue. But the lower courts have drawn different conclusions from similar governmental arrangements. Three circuits, for example, have inferred policymaking authority on the basis of the sheriff's or the prosecutor's status as an elected official. See *Gobel*, 867 F.2d at 1208 (citing cases). In this case, however, the Tenth Circuit refused to subject Okmulgee County to liability for Sheriff Weaver's actions, even though he is an elected representative of the County, see Okla. Stat. tit. 19, § 131 (1990 Supp.). Other courts have found it significant that state law provides no higher review of the police procedures used by the Sheriff. See *Sinyard*, 884 F.2d at 828; *Weber*, 804 F.2d at 803; see also *Meade*, 841 F.2d at 1530. Again in contrast, the court below implicitly found irrelevant Sheriff Weaver's assigned role in this regard.[13] Moreover, the Sixth Circuit, like the court below, appears to have adopted a definition of what may qualify as a "policy" that is inconsistent with that employed elsewhere. Compare *Frost*, 851 F.2d at 828-829 (one-time arrest does not qualify as a policy), with, *e.g.*, *Sinyard*, 884 F.2d at 807, 828 (one-time search and seizure was an

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[13] The decision below is therefore inconsistent with the Fifth Circuit's recent *Sinyard* decision in particular. That case similarly involved a sheriff's instructions that his subordinates break into the plaintiffs' office and seize their personal property. The Fifth Circuit held that the county was properly subjected to liability because "[u]nder Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers." 884 F.2d at 828 (citation omitted).

official county policy). Cf. *Pembaur*, 475 U.S. at 483 (plurality opinion) (government policy can consist of a "single decision"). Because of the sharp division among the lower courts, with most courts disagreeing with the standard applied below, review by this Court is appropriate.

C. Defining the Proper Contours of "Final Policymaking Authority" Is an Important Issue that Should Be Addressed by this Court.

As the plurality in *Praprotnik* recognized, "special difficulties can arise" when a plaintiff contends that policymaking authority has been delegated to a governmental official. 485 U.S. at 126. To begin with, this Court's decision in *Monell* that local governments may not be held vicariously liable gives those governments a considerable incentive to attempt to place the responsibility for injuries onto its employees. "If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose." *Praprotnik*, 485 U.S. at 126 (plurality opinion).

Moreover, decisions such as the one below threaten to eliminate "the uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) offered by Section 1983. As noted above, the employees to whom governments may try to shift the blame are often shielded from any monetary liability by qualified immunity. See, *e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Were the governments to succeed, the "damages remedy against the offending party [which] is a vital component of [Section 1983]" would thus be effectively negated. *Owen*, 445 U.S. at 651.

On the other side of the coin, too expansive a conception of "policymaking authority" would threaten to blur the line between governmental liability for "official policy" and governmental policy for respondeat superior, and would thus violate Congress' intent as interpreted in *Monell*. See 436 U.S. at 691-693. In addition, more predictability in this area would have a salutary effect on local governments: it would permit them to arrange their affairs so as to avoid making "municipal governance into a hazardous slalom through [unforeseeable] constitutional obstacles" and thereby to confine a "severe limitation on their ability to serve the public." *Owen*, 445 U.S. at 665, 670 (Powell, J., dissenting).

Last, the significant number of cases involving this issue that this Court has heard in recent years itself demonstrates the issue's importance. The blind eye turned by the Tenth Circuit to this Court's precedents – and the extremely restrictive view it took of government liability for actions pursuant to delegated authority – should not be sanctioned without plenary review by this Court.[14] The Court should grant the petition to resolve the conflict among the circuits and to elucidate further the principles controlling governmental liability for the actions of its officials.

III. THE TENTH CIRCUIT'S CONCLUSION THAT HARTMAN'S LAW FIRM MAY NOT BE HELD LIABLE FOR HIS ACTIONS ILLEGITIMATELY SUPPLANTS OKLAHOMA PARTNERSHIP LAW.

The Tenth Circuit's improper limitation of the federal remedy available to petitioners was not limited to the

[14] Of course, the same reasons requiring the reinstatement of Okmulgee County also require that the suit be allowed to proceed against the officers in their official capacities. See, *e.g.*, *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985).

government defendants; in addition, it refused to let the suit proceed under any theory against the law firm of which Hartman is a partner and on behalf of whose client Hartman was acting. Under Section 13 of the Uniform Partnership Act, which has been enacted without change as Okla. Stat. tit. 54, § 213 (1969), a law partnership is liable for the torts of one of its partners if that tort occurred in the ordinary course of the firm's business. The Tenth Circuit's implicit belief that this general rule does not apply in Section 1983 actions is unjustified and independently warrants correction by this Court.

It is of course clear that a *government* entity may not be held liable under Section 1983 on the basis of respondeat superior. See, *e.g.*, *Monell*, 436 U.S. at 691. However, the Court has never held or intimated that a *private* entity cannot be vicariously liable in a suit brought under the Civil Rights Acts when state agency law indicates that it should be so liable.

A. In *Monell*, the Court held that the Forty-second Congress did not intend to *create* a "federal law of *respondeat superior*" holding local governments accountable for the acts of their employees. 436 U.S. at 693. Although the Court did note that Section 1983's focus on persons who "subject, or cause to be subjected," another person to a deprivation of a constitutional right "cannot be easily read to impose liability vicariously," it primarily relied on legislative history indicating that Congress in 1871 was unsure of the constitutionality of imposing such liability on government entities. *Id.* at 691-693 & n.57; see also *Jett*, 109 S. Ct. at 2710-2722 (rejecting the argument that 42 U.S.C. § 1981 – which does not contain the language "subject, or cause to be subjected" – creates a federal law

of respondeat superior liability on the basis of this legislative history). However, the opinion in *Monell*, the language of Section 1983, and the legislative history of the statute say *nothing* to suggest that Congress did not mean to incorporate *state* vicarious liability law into Section 1983, a result that would never have raised constitutional objections.[15]

B. In situations where the language and history of Section 1983 are silent, this Court has held that it *does* incorporate state and common law principles, for "[i]t is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). In the context of immunities from Section 1983 liability, for example, "[o]ne important assumption underlying the Court's decisions * * * is that members of the 42d Congress were familiar with common-law principles * * * *and that they likely intended these common-law principles to obtain*, absent specific provisions to the contrary." *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309 (1989) (quotation omitted) (emphasis added). Thus, although Section 1983's language makes "no mention * * * of * * * immunities," the Court has on many occasions read preexisting common law immunities into its provisions. *Owen*, 445 U.S. at 635-639 (citing cases). It is equally "likely" that Congress "intended the[] common-law principles" of respondeat superior "to obtain."

Moreover, 42 U.S.C. § 1988 expressly instructs federal courts to fill in any deficiencies in the federal civil rights

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[15] The law of respondeat superior of course antedates the Civil Rights Acts. See, *e.g.*, 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 26.2 (2d ed. 1986).

laws by looking to state and common law, so long as these are not inconsistent with the federal policies. See, *e.g.*, *Robertson v. Wegmann*, 436 U.S. 584, 588-591 (1978). There can be no suggestion that private vicarious liability pursuant to state law is inconsistent with Section 1983's deterrent and compensatory goals.

C. Significantly, the Court has expressly reserved the question whether private entities may be vicariously liable under state and common law principles in suits brought under other provisions of the Civil Rights Acts. See *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-395 (1982) (denying vicarious liability in Section 1981 actions against a private entity, "[o]n the assumption that *respondeat superior* applies," because there was no evidence of an agency relationship). In the aftermath of *General Building Contractors*, the Fifth Circuit – expressly noting the distinction between holding public and private entities vicariously liable – has held that respondeat superior does apply in Section 1981 actions against private parties. See *Flanagan v. Aaron E. Henry Community Health Services Center*, 876 F.2d 1231, 1235 (1989). And as the Fifth Circuit noted, five other circuits have imposed liability vicariously on private entities in suits brought under Section 1981. See *ibid.* (citing cases). The liabilities imposed by Sections 1981 and 1983 are interrelated and should be construed with that in mind (see *Jett*, 109 S. Ct. at 2720-2721), and therefore these Section 1981 decisions are inconsistent with the Tenth Circuit's approach. This Court should grant the petition to correct the misconstruction of Section 1983 by the court below and to resolve the inconsistency in the interpretation of the different provisions of the Civil Rights Acts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1990

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLF, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolf, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolf and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796
(D.C. No. 87-412-C)
(E.D. Okla.)

(Filed Aug 3, 1989)

ORDER AND JUDGMENT*

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiffs-appellants appeal the district court's orders and judgments of September 27, 1988, entering summary judgment in favor of each of the defendants. Plaintiffs[1] instituted the underlying action pursuant to 42 U.S.C. § 1983 for violations of their fourth and fifth amendment rights when certain defendants forcibly entered their home and seized their property, pursuant to a writ issued in aid of execution.

We review the grant or denial of summary judgment *de novo*, applying the same standard as the district court

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[1] The original plaintiffs in this action consisted of Mr. and Mrs. Watson and their minor son, Brian. During the pendency of the district court case, Mr. and Mrs. Watson filed bankruptcy and the trustee of their estate substituted for them as a party plaintiff. In addition, Brian reached the age of majority.

under Fed. R. Civ. P. 56(c). *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988).

Based upon our review of the record on appeal and the parties' briefs, we conclude that under no theory should plaintiffs' case proceed against any defendants other than Andrew S. Hartman, Bill Weaver, and Tom Newton. Therefore, the district court properly entered summary judgment in favor of the other defendants.

The district court entered summary judgment in favor of Messrs. Hartman, Weaver, and Newton on the grounds that plaintiffs had an adequate state law remedy for their alleged injuries, relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). While *Parratt* may apply to plaintiffs' due process claims under the fifth amendment, it does not apply to plaintiffs' claims for unreasonable search and seizure under the fourth amendment. *See Lavicky v. Burnett*, 758 F.2d 468, 472 n.1 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *King v. Massarweh*, 782 F.2d 825, 827 (9th Cir. 1986); *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 872 (7th Cir. 1983).

Since the district court incorrectly applied *Parratt* to plaintiffs' fourth amendment claim, we must reverse the court's entry of summary judgment in favor of Messrs. Hartman, Weaver, and Newton and remand the action so that the court may consider plaintiffs' claim in the first instance. In so doing, we express no opinion as to the merits of plaintiffs' claim.

Plaintiffs argue on appeal that their fifth amendment claim is so intertwined with their fourth amendment

claim that they should be permitted to proceed in federal court on both claims, rather than having their fifth amendment claim dismissed due to adequate state remedies. On remand, the district court should consider plaintiffs' fourth amendment claim on its own and as it may be intertwined with the fifth amendment claim.

The judgment of the United States District Court for the Eastern District of Oklahoma is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this order and judgment. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

RICHARD C. LERBLANCE, Bankruptcy Trustee, and BRIAN HARJO WATSON,	)	No. 87-412-C
Plaintiff,	)	(Filed Sept. 27, 1988)
vs.	)	
BILL WEAVER, et al.,	)	
Defendants.	)	

ORDER

Now before the Court for its consideration is the motion of defendant Board of Commissioners of Okmulgee County (the Board) for summary judgment.

In March, 1986, defendant S & T Gas Transmission Company, Inc. (S&T), obtained a jury verdict against M. Frank Watson and Betty L. Watson (original plaintiffs in the case at bar, now substituted for by the trustee in their bankruptcy action), in the District Court of Creek County in the sum of $1.00. The trial judge, Judge John Maley, set the verdict aside the entered judgment notwithstanding the verdict in favor of S&T in the amount of $85,244.11 plus interest. Also awarded were $40,064.13 in attorney fees in favor of the law firm of Barkley, Rodolf, White & Hartman (Barkley, Rodolf). The Watsons appealed the entry of judgment to the Supreme Court of Oklahoma in May, 1986. Apparently, no supersedeas bond was posted.

On or about December 12, 1986, attorney Andrew S. Hartman (Hartman) obtained an *ex parte* writ of execution

from Judge Maley. The writ was delivered to defendant Bill Weaver, Sheriff of Okmulgee County, where property owned by the Watsons was located. The writ provided in pertinent part that "you are hereby commended [sic] to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated at Exhibit 'A' to this Writ." Hartman, Deputy Sheriff Tom Newton (Newton), and the anonymous John and Jane Doe, proceeded to the Watsons' home. Upon finding it locked, Newton sought guidance from the Okmulgee District Attorney, who told Newton to enter the house. The house was forcibly entered and property of the plaintiffs was taken from the dwelling. The plaintiffs, the bankruptcy trustee and the original plaintiffs' son, bring this action under 42 U.S.C. § 1983.

The United States Court of Appeals for the Tenth Circuit has recently addressed "supervisory liability" under Section 1983. The court stated:

> "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or discretion, or his failure to supervise.'" To be liable, a superior must have "participated or acquiesced in the constitutional deprivations of which complaint is made." A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable. . . . Unless a supervisor has established or utilized an unconstitutional policy or custom, a

> plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation.
>
> *Meade v. Grubbs*, 841 F.2d 1512, 1527-28 (10th Cir. 1988) (citations omitted).

The plaintiffs have made no showing of any "affirmative link" between the Board and the actions of which complaint is made. The Board is not responsible for the training of the County's law enforcement officers. *See Meade*, 841 F.2d at 1528. Nor has there been a showing of an unconstitutional policy or custom within Okmulgee County. The Court must conclude that there is no genuine issue of material fact regarding the Board's liability.

It is the Order of the Court that the motion of the Board of Commissioners of Okmulgee County for summary judgment is hereby GRANTED.

IT IS SO ORDERED this 27th day of September, 1988.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

RICHARD C. LERBLANCE, Bankruptcy Trustee, and BRIAN HARJO WATSON, Plaintiffs, vs. BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., a Oklahoma corporation; JOHN DOE; JANE DOE; and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA, Defendants.	)	No. 87-412-C (Filed Sept. 27, 1988)

ORDER

Now before the Court for its consideration is the motion for summary judgment of all defendants, with the

exception of Bill Weaver, Tom Newton, the anonymous John Doe and Jane Doe, and the Board of Commissioners of Okmulgee County. The factual basis of this action has been described in a companion Order.

The movants assert two bases for the entry of judgment in their favor: (1) the existence of adequate state remedies, and (2) qualified immunity. Because the Court finds the first basis dispositive, the other basis will not be addressed. In a series of decisions, the most recent being *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the United States Supreme Court has addressed the application of §1983 within the debtor-creditor context. However those cases have dealt with due process requirements regarding garnishment actions and *prejudgment* attachments. "Of course, once the creditor has established his claim through a trial, the debtor has been accorded due process of law and the state may aid the creditor to enforce his judgment." 2 R.Rotunda, J.Nowak & J.Young, *Treatise on Constitutional Law: Substance and Procedure*, §17.9 at 285 (1986). Therefore, the taking of plaintiffs' property *per se* does not constitute a constitutional violation.

The Oklahoma statutes dealing with execution by creditors, 12 O.S. §§731, *et seq.*, do not provide for breaking into the debtor's home in order to secure the property in question. The issue to be resolved is whether the actions taken permit liability under §1983. In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court held that when deprivations of property are effected through random and unauthorized actions of state employees and the state provides an adequate post-deprivation remedy, the requirements of due process are satisfied and the plaintiff

may not maintain a §1983 action. *See also Hudson v. Palmer*, 468 U.S. 517 (1984) (extending the reasoning of *Parratt* to an unauthorized and intentional deprivation of property by a state employee).[1] The Court must determine if the actions in question were random and unauthorized or pursuant to a challenged state statute, regulation or established procedure.

The Court has concluded that there is no genuine issue of material fact as to whether the conduct complained of was random and unauthorized rather than in accordance with established state procedures. There is no law or regulation permitting entry into a home in execution of a judgment. While the law officer allegedly relied upon advice of an assistant district attorney for the county, there has been no showing that this is official county policy. A single decision by policymakers may constitute such a policy under appropriate circumstances. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). One may be found responsible for final policymaking authority through (1) legislative enactment, or (2) delegation by an

---

[1] The Court is aware that some courts have found *Parratt* inapplicable to violations of the Fourth Amendment. *See, e.g., Augustine v. Doe*, 740 F.2d 322, 325-27 (5th Cir. 1984). The Supreme Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). However, the United States Court of Appeals for the Tenth Circuit has not adopted the Fourth Amendment "exception" to the *Parratt* analysis, and this Court is aware of no decision applying the exception in this context. This Court declines to do so.

official possessing such authority. There has been no evidence presented of delegation. As for legislative enactment, 19 O.S. §215.5 provides as follows:

> The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

Under the terms of this statute, it appears that any statements made by an assistant district attorney constitute "legal advice" rather than official county policy. In *Pembaur, supra* the Supreme Court indicated that mere "legal advice" is not grounds for reliability. 475 U.S. at 484-85.

Oklahoma law provides causes of action for trespass and wrongful levy. *See Fairlawn Cemetery Ass'n v. First Presbyterian Church,* 496 P.2d 1185 (Okla. 1972) *and Farris v. Castor,* 99 P.2d 900 (Okla. 1940). The Court believes that the plaintiffs therefore have adequate state remedies by which they may seek redress for the alleged wrongful conduct.

Defendants Weaver and Newton have not moved for summary judgment. However, under the Court's analysis no §1983 is maintainable against them either. Accordingly, judgment shall be entered in their favor as well.

It is the Order of the Court that the motion of the defendants for summary judgment is hereby GRANTED.

It is the further Order of the Court that judgment is hereby entered *sua sponte* in favor of defendants Bill Weaver and Tom Newton.

IT IS SO ORDERED this 27th day of September, 1988.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796

(Filed Nov. 28, 1989)

ORDER

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

This mater is before the court on the petition for rehearing filed by appellee Andrew S. Hartman.

The materials submitted by appellee have been reviewed by the members of the hearing panel, who conclude that the directions on remand in the original disposition should be modified to clarify that appellants may not proceed on their due process claim. Accordingly, the petition is GRANTED, the mandate is recalled, and the original order and judgment is MODIFIED to reflect that on remand the district court should consider only appellants' fourth amendment claim.

The mandate shall issue forthwith.

Entered for the Court

ROBERT L. HOECKER, Clerk

By/s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796

(Filed Nov. 28, 1989)

ORDER

Before HOLLOWAY, Chief Judge, McKay, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter is before the court on appellants' petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, to the extent the petition seeks rehearing, it is denied on the merits, and the mandate is recalled. To the extent the petition seeks clarification of our original disposition, the parties are instructed that the remand of appellants' fourth amendment claim against appellees Hartman, Weaver, and Newsom [*sic*] is against those individuals in their personal capacities only. Appellants may not proceed against Sheriff Weaver or Deputy Sheriff Newton in their official capacities, nor may they proceed against Mr. Hartman's professional corporation.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc,

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

The mandate shall issue forthwith.

Entered for the Court

ROBERT L. HOECKER, Clerk

By/s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

(2)

NO. 89-1518

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

* * * * * * * * *

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

* * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

* * * * * * * * * *

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NO. 89-1518

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma Corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma Corporation; Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma Corporation; Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma Corporation; JOHN DOE; JANE DOE and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Respondents.

* * * * * * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Bill Weaver, Tom Newton, and Board of Commissioners of Okmulgee County, Oklahoma, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case.

OPINIONS BELOW

Respondents do not disagree with petitioners' statements of the district court's and court of appeals' opinions set out in the petition. (Pet. 1a-17a). However, petitioners have failed to inform the court of subsequent judgments in this matter which occurred after the Tenth Circuit rendered its opinion which reversed and remanded this case to the trial court.

Petitioners did not file an application to stay the district court proceedings after this case was remanded from the Tenth Circuit in November, 1989.

Petitioners also did not inform the district court that they had sought an extension of time in which to file their petition for writ of certiorari. Thus, the district court proceeded to hear matters involving certain of the respondents.

In addition to those opinions rendered at the trial and appellate levels attached to the petition for certiorari, the United States District Court for the Eastern District of Oklahoma on March 15, 1990, granted summary judgment for respondents Bill Weaver and Tom Newton. (App. 1a-5a). The district court granted judgment for Weaver and Newton after petitioners failed to respond to the motion for more than two months. The district court further examined the pleadings and evidentiary materials and granted judgment on the merits for Newton

and Weaver based on theories of judicial immunity.

JURISDICTION

Petitioners seek to review a decision of the Tenth Circuit which reversed and remanded the district court decision as to Newton, Weaver, and Hartman. (Pet. 3a, 14a, 16a). As to these respondents, petitioners prevailed in the Tenth Circuit and were not aggrieved by the court's ruling. Any reversible error as to Weaver and Newton is moot in that the Tenth Circuit granted petitioners the relief they requested in that court. This Court's jurisdiction does not extend to moot questions except in extraordinary circumstances. See, DeFunis v. Odegaard, 416 U.S. 312 (1974).

Furthermore, as noted above, on remand the district court granted summary judgment for Weaver and Newton. (App. 1a-5a)

Petitioners have not filed a motion for new trial or any other appropriate pleading to challenge the district court's March, 1990 ruling. It is clear that events subsequent to the ruling of the court of appeals may deprive this Court of the need to exercise jurisdiction. See, e.g., Mahler v. Doe, 432 U.S. 526 (1977).

STATEMENT OF THE CASE

Whether inadvertent or intentional, petitioners have neglected to include a number of significant facts in their statement of the case. Petitioners have further mischaracterized many of the proceedings below. An accurate statement of the facts and proceedings below is vital to the Court's understanding of the specific actions taken on the part of the respondents. Petitioners have a duty to this Court to present "clear, definite,

and complete disclosures concerning the controversy when applying for certiorari." Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924). In the instant case, petitioners have failed to make such a disclosure.

Petitioners paint themselves as blameless citizens deprived of their statutorily exempt personal property by actions of law enforcement officers, attorneys, and elected officials. Such a characterization is unsupported by the record.

Petitioners begin by noting that in a breach of contract action in Oklahoma state court, attorney Hartman obtained a judgment of more than $100,000 against petitioners and on behalf of his client, S&T Gas Transmission. (Pet. 4). Petitioners fail to inform the Court that

although they appealed this judgment to the Oklahoma Supreme Court, they neglected to post a supersedeas bond or any other statutory security.

In the State of Oklahoma, the posting of a supersedeas bond or other proper security is an absolute necessity to stay the execution or effect of a judgment while the appeal is pending. Okla. Stat. tit. 12 §968 (1981). Thus, respondents did not "rush to satisfy the six-figure judgment," (Pet. 3), but merely pursued their rights under Oklahoma law. See, e.g., Reuck v. Green, 103 Okla. 288, 229 P. 1070 (1924). Without the posting of proper security in the Oklahoma courts by petitioners, Hartman and S&T Gas Transmission were well within their rights in seeking to execute on the judgment.

Pursuant to its judgment, S&T Gas Transmission, through attorney Hartman, then attempted to collect the judgment. S&T Gas Transmission began a garnishment action, pursued asset hearings, and other collection procedures. (Hartman depo. pp. 28-30). Hartman also procured the writ in aid of execution which forms the basis of this lawsuit. (App. 6a-7a). Petitioners place great emphasis on the fact that the asset hearing had not been completed before the writ was issued. Petitioners fail to inform the Court that the asset hearing was "continued" under extraordinary circumstances. When the Watsons were served with a writ of execution at the hearing on assets, Mrs. Watson left the courtroom without the judge's permission and hid in her attorney's office behind locked doors. Attorney Hartman and the deputy sheriff

then proceeded to the attorney's office where Mrs. Watson refused to come out, even after being instructed to do so by the deputy sheriff. Hartman and Mrs. Watson's attorney had an altercation at the attorney's office which included the attorney's closing the office door on Hartman's foot. (Hartman depo. pp. 44-47.)

Exasperated by the Watsons' repeated attempts to frustrate his collection efforts, Hartman finally sought a writ in aid of execution from Oklahoma District Judge John David Maley, the same judge who had heard the underlying breach of contract action. Once again, Petitioners place great emphasis on the fact that Judge Maley was not the same judge who was involved in the asset hearing. This fact is wholly irrelevant in that both Judge Maley and Judge Donald Thompson,

sitting in the same judicial district, had authority to enter orders in this particular matter. Oklahoma does not have county judges or county courts. Okla. Const. Art. 7 §7. (App. 9a). Although these judges were sitting in different counties, their jurisdiction extended throughout the district. Okla. Stat. tit. 20 §120 (1981).

Judge Maley was well aware of the facts of the case, as well as the conduct of the parties, including the fact that petitioners had consistently attempted to frustrate service of summons and other legal process. (Maley depo. p. 15). Judge Maley signed the writ after examining its contents and being fully satisfied that it conformed to law and was in all ways proper. (Maley depo. p. 16). As a district judge for some twenty-two years, Judge Maley was clearly

familiar with proceedings involving execution of judgments. Furthermore, the writ included, as an attachment, a list of specific property which was subject to execution. (App. 8a). An examination of this list shows that none of this property is exempt from execution pursuant to Okla. Stat. tit. 31 §1 (Supp. 1989). (App. 11a-13a).

Armed with this properly executed writ, issued by an Oklahoma District Judge, Hartman sought assistance from the sheriff's office. Service of writs and other legal process is a statutory responsibility of county sheriffs. Okla. Stat. tit. 19 §523 (1981). (App. 10a). In fact, a sheriff may be fined for a failure to "make due return of any writ or process delivered to him to be executed." Id.

Accompanied by Deputy Sheriff Tom Newton, Hartman proceeded to the Watsons' home. Petitioners correctly state that Deputy Newton sought advice from Sheriff Weaver on how to proceed when he found the home locked. Sheriff Weaver then contacted District Attorney Thomas C. Giulioli, who advised him to proceed according to the terms of the writ. Petitioners fail to include the significant fact that Judge Maley was also contacted prior to the forced entry. (Maley depo. p. 9). Upon instructions from the sheriff, the district attorney, and the district judge; Deputy Newton carefully removed a door on the Watsons' home.

It must be noted at this point that the Board of Commissioners of Okmulgee County was never involved either directly or indirectly in any of these

proceedings. The County Commissioners were not consulted either as a group or individually. The County Commissioners had set no policy concerning execution of judgments and indeed had no jurisdiction to do so. Furthermore, The County Commissioners exercised no control or authority over either the district attorney or the sheriff.

In Oklahoma, county commissioners are public officials elected from districts within their respective counties to govern certain matters within the county. Okla. Stat. tit. 19 §321 (1981 and Supp. 1989). County sheriffs are also elected officials and serve the citizens of their respective counties. Okla. Stat. tit. 19 §131 (1981 and Supp. 1989). County sheriffs are not subject to the direction or control of the Board of County Commissioners. Okla. Stat. tit. 19 §339

(1981 and Supp. 1989). With the exception of certain auditing of the sheriff's operating budget, these elected officials operate independent of one another.

District attorneys, however, do not represent particular counties, but are elected from Oklahoma's judicial districts. In fact, there are only twenty-six "judicial districts" in Oklahoma and seventy-seven counties. Okla. Stat. tit. 20 §§92.1 through 92.27 (1981). (App. 10a). The office of district attorney is filled "in the same manner" as the office of district judge. Okla. Stat. tit. 19 §215.1 (1981). Although district attorneys may give legal advice and assistance to both law enforcement officers and county commissioners, a district attorney does not make policy decisions for any other

elected officials, and, in fact, has no jurisdiction to do so. District judges are elected from the same judicial districts as district attorneys. Judge Maley and Judge Thompson were both district judges in Judicial District No. 24, which consists of Okfuskee, Okmulgee, and Creek Counties. Okla. Stat. tit. 20 §92.25 (1981). (App. 11a).

Petitioners wholly ignore these important jurisdictional distinctions in their argument. Petitioners further seek to blur the fact that the district judge who issued the writ had jurisdiction and power over all the parties below. None of the respondents could have circumvented the court's ruling. Deputy Newton was merely following the orders of the sheriff, district attorney, and district judge in carrying out his statutory duty.

Contrary to Petitioners' claims, the property was not "indiscriminately seized," (Pet. 10-11), but instead was carefully collected as it conformed to the list attached to the writ. With the exception of one check for $6.67, all the property seized fell outside the exemptions of Okla. Stat. tit. 31 §1 (Supp. 1989). (App. 11a-13a). The property was carefully inventoried as it was removed and the dwelling was then secured. The seized property was placed in storage and later returned to the Watsons.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision below was in accordance with established case law of this Court concerning causes of action for deprivation of property in alleged violation of due process. The Tenth Circuit's ruling is not in conflict with recent

pronouncements in Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990), and Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989). Furthermore, the Tenth Circuit's ruling is in harmony with Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

Finally, petitioners failed to present many of the issues below which they now assert on appeal. Additionally, as to certain respondents, these issues are now moot. There is simply no question of law that justifies the granting of a writ of certiorari. Because of the unusual facts and circumstances involved here, this case revolves around questions unlikely

to recur in other cases. Lastly, this case would require resolutions of questions of fact decided adversely to petitioners in both the trial court and appellate court.

I.

NEITHER THE DECISION BELOW, NOR THE RECORD, RAISES THOSE QUESTIONS PRESENTED IN THE PETITION

Through inflated rhetoric, petitioners have attempted to raise this case to a much higher level of importance than its facts warrant. In all due respect to this Court, respondents assert that the only "question presented" for this Court is whether a board of county commissioners, sheriff, and deputy sheriff may be held liable for carrying out a facially valid writ signed by a district judge. The answer, of course, under any authority presented, is a resounding "no."

A. THIS COURT SHOULD NOT DECIDE QUESTIONS NEITHER RAISED NOR RESOLVED IN THE LOWER COURT

The sole question presented for review to the Tenth Circuit was whether a genuine issue of fact remained for the jury concerning petitioners' claims that they were denied due process and equal protection when Newton and Hartman entered their home and removed property. Petitioners' appeal to the Tenth Circuit was based entirely on violations of their Fourth Amendment rights. Petitioners' brief to the Tenth Circuit contained less than four pages of argument and authorities. Petitioners relied almost entirely on this Court's rulings in Parratt v. Taylor, 451 U.S. 527 (1981), and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

Petitioners never raised issues in either the district court or the court of

appeals concerning the exempt status of the property which was seized. Furthermore, Petitioners have never attacked the statutory procedures set out in Oklahoma law which provide for execution of judgments. This allegedly "established state procedure" was for the first time questioned in Petitioners' brief before this Court. (Pet. 12).

The "normal policy" of this Court is to refuse to consider issues "which have not been presented to the Court of Appeals." Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967), reh'g denied, 386 U.S. 1027 (1967). When issues are not properly and timely presented below, such issues are "not properly presented for review." Id. This standard is particularly applicable in review of an order granting summary judgment. The specific requirements of

Fed. R. Civ. P. 56, mandated that petitioners present their evidentiary materials and legal argument in the courts below. Petitioners cannot for the first time present issues of fact to this Court. See, e.g., United States v. Village of Aslip, 345 F.2d 365, 370 (7th Cir. 1965), cert. denied, 382 U.S. 906 (1965).

In opposition to the motion for summary judgment, petitioners failed to present evidentiary material or argument concerning the procedure for execution of judgments in Oklahoma. Petitioners raised neither argument nor evidence concerning alleged exempt property. Petitioners further failed to establish any connection whatsoever between the County Commissioners and the alleged deprivation of their Fourth Amendment rights. These issues were not properly

preserved and may not be raised now. Youakim v. Miller, 425 U.S. 231, 233-34 (1976) (per curiam).

This Court "has often refused to decide constitutional questions on an inadequate record." Ellis v. Dixon, 349 U.S. 458, 464 (1955). The Ellis Court explained the rationale behind such a refusal in noting, "if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the [Court of Appeals] was entirely justified in refusing to pass on them." Id.

B. THIS COURT SHOULD DECLINE TO REVIEW FACTUAL DETERMINATIONS DECIDED BELOW

Petitioners assert that "[t]he court of appeals did not explain the basis for its ruling that Okmulgee County and the law firm could not be sued for violation of the Fourth Amendment." (Pet. 8). An

examination of the Tenth Circuit's opinion shows that the court based its ruling "upon our review of the record on appeal and the parties' briefs," (Pet. 3a), concluding "that under no theory should plaintiffs' case proceed against [the County Commissioners]." Id.

The record below shows that the only theory presented to the trial court to establish liability for the County Commissioners was based on its "supervisory liability" of Deputy Newton. The trial court found that as a matter of fact and law, the County Commissioners were not responsible for actions of law enforcement officers. (Pet. 7a). Under the clear holding of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the County Commissioners cannot be liable under §1983 on respondeat superior theories. Accord,

Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989).

The trial court further found no "affirmative link," between the County Commissioners and the actions set out in the complaint. (Pet. 7a.). Although petitioners attempted to establish that Deputy Newton was acting according to policy, they failed to show either the existence of such a policy, the effect of such a policy, or a violation of such policy. (Pet. 7a). Indeed, petitioners failed to present such evidence because none exists. The district court correctly found that the conduct was "random and unauthorized," (Pet. 10a) a factual determination accepted by the Tenth Circuit. As stated in Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980), this Court will decline to review findings of fact

in which the district court and court of appeals concur.

Both courts below correctly concluded there was no evidence of an established policy. Both courts further concluded that the facts showed a random and unauthorized act. This finding is supported by the record and does not warrant further review.

II.

PETITIONERS HAVE PRESENTED NO REASON FOR THE COURT TO GRANT CERTIORARI

Petitioners attempt to argue that the Tenth Circuit's ruling is in conflict with other courts concerning the import of Parratt v. Taylor, 451 U.S. 527 (1981). The court's ruling is in harmony with Parratt. Furthermore, even if the ruling were contrary to Parratt, the Tenth Circuit reversed and remanded that part of the district court's decision

which relied on Parratt. Thus, any error will be corrected on remand.

A. THE TENTH CIRCUIT CORRECTLY APPLIED THE LAW

Concerning petitioners' Fifth Amendment claims of deprivation of property, these claims were not properly presented in their brief to the Tenth Circuit. Furthermore, the Tenth Circuit correctly ruled that such claims were governed by the Court's ruling in Parratt v. Taylor. Parratt was a §1983 action brought by a prisoner after prison employees negligently lost materials he had ordered by mail. The prisoner did not dispute that he had a post-deprivation tort remedy in state court. In Parratt, the Court ruled that the tort remedy was all the process the party deprived of property was due, because any predeprivation procedural safeguards that

the State did provide, or could have provided, would not address the risk of this kind of deprivation. The Court explained:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.

451 U.S. at 541. The proper inquiry under Parratt is "whether the state is in a position to provide for predeprivation process." Hudson v. Palmer, 468 U.S. 517, 534 (1984) (emphasis added).

In the instant case, the state of Oklahoma adequately protects the rights of judgment debtors through the posting

of a supersedeas bond, appellate procedures, hearings on assets, and garnishment statutes. As noted earlier, petitioners failed to post any appeal bond and thus their non-exempt property became subject to levy and execution. Petitioners were represented by counsel and completely ignored the statutory procedures available to them to protect their property in both the Oklahoma appellate courts and the collection proceedings.

Furthermore, attorney Hartman's actions were not the kind of acts contemplated or condoned under Oklahoma law. As the district court and Tenth Circuit concluded, these acts were "random and unauthorized." Thus, the holding of Parratt clearly applies.

Parratt's reasoning was extended to intentional deprivations of property in

Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, a prisoner alleged that a guard deliberately and maliciously destroyed his property. Once again, the prisoner had a tort remedy which could have compensated him for the loss. In Hudson, as in Parratt, the state official was not acting pursuant to established state procedures, but was pursuing a random, unauthorized vendetta against the prisoner. Id. at 521, n. 2. The Court noted: "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." Id. at 533.

As characterized in Zinermon v. Burch, ___ U.S. at ___, 110 S.Ct. at 978, the rulings in Parratt and Hudson concerned "a deprivation of a constitutionally protected property interest caused by a

state employee's random, unauthorized conduct." Such conduct "does not give rise to a §1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy." Id. at ___, 110 S.Ct. at 978. Parratt's and Hudson's rationales were stated to reach those situations "where the State cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient." Id. Parratt and Hudson each represent cases "in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." Id. at ___, 110 S.Ct. at 985.

The Tenth Circuit correctly applied Parratt to the petitioners' Fifth Amendment claims. The facts of the instant case, as those in Parratt and Hudson show a "random, unauthorized act." Petitioners have never challenged the adequacy of state tort remedies. This case clearly satisfied those criteria where a common-law tort remedy for erroneous deprivation satisfies due process. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). Additionally, petitioners did not challenge the district court's findings concerning their Fifth Amendment claims in their brief to the Tenth Circuit.

Petitioners' brief to the Tenth Circuit set out as their only challenge the district court's application of Parratt to their Fourth Amendment search and seizure claims. Contrary to

petitioners' assertions, the Tenth Circuit did not conclude that petitioners had "an adequate state law remedy," for their Fourth Amendment claims. In fact, the part of the district court's ruling which applied Parratt to the Fourth Amendment search and seizure claims was reversed and remanded. (Pet. 3a-4a). Respondents are at a loss to understand the import of petitioners' argument to this Court in that they have been granted the relief which they sought by the very ruling of which they now complain. There is no reason for this Court to grant certiorari when any alleged error will be corrected on remand. Furthermore, the district court and Tenth Circuit have concluded that the acts complained of were both "random" and "unauthorized," based on the fact that entry into a dwelling house is not permitted under

Oklahoma law. These factual determinations are not subject to review.

B. PEMBAUR v. CITY OF CINCINNATI IS INAPPLICABLE

In Steagald v. United States, 451 U.S. 204 (1981), the Court held that an officer may not search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant, unless the search is consensual or justified under exigent circumstances. The holding in Steagald was extended to constitutional violations of Fourth Amendment rights to create a basis for civil liability under §1983 in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). However, Pembaur was premised on the existence of a government policy "to take an unlawful action made by municipal policymakers." Id. at 483. The Court held:

> [T]hat municipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

Petitioners have been unable to ever show any official "policy" on the part of the County Commissioners or the Sheriff which would have authorized or supported the forced entry in this case. In fact, the official "policy" was "to try not to forcibly enter anywhere." (Weaver depo. p. 19.) Apparently realizing this difficulty, petitioners tried to establish that the district attorney's advice to forcibly enter the Watsons' home established county policy. Petitioners have never presented any evidence in support of this, and their

legal argument omits fatal distinctions in Oklahoma's statutory scheme of governmental authority.

The district court correctly ruled, and the court of appeals affirmed, that the requisites for governmental liability set out in Pembaur, had not been met. Pembaur established that "[county] liability attaches only where the decision-maker possesses final authority to establish [county] policy with respect to the action ordered." Id. at 481 (footnote omitted). If the county official offered mere "legal advice," this is not grounds for liability. Id. at 484-85. Pembaur established that the policy making authority may be shown by (1) legislative enactment, or (2) delegation of authority.

Oklahoma law allows a district attorney to "give opinions or advice to

the board of county commissioners and other civil officers of his counties when requested." Okla. Stat. tit. 19 §215.5 (Supp. 1989) (App. 10a). Thus, pursuant to statute, the district attorney is clearly not a policymaker for the County Commissioners. The district attorney in Judicial District No. 24, served the citizens of three counties. As far as delegation of authority, the record is totally devoid of any evidence of delegation of authority to the district attorney by an official possessing such authority. In Oklahoma, the district attorney's authority is derived solely from statute.

Jett v. Dallas Independent School District, ___ U.S. ___, 109 S.Ct. 2702 (1989), does not change this ruling. Jett did not deal with Fourth Amendment claims. Jett further did not address the

adequacy of post deprivation remedies. Jett instead determined that the explicit remedies of §1983 were controlling in the context of damages actions brought against state actors pursuant to §1981. In so holding, Jett reaffirmed the Court's refusal to adopt a respondeat superior standard on municipalities for violations of federal civil rights by their employees. Id. at ___, 109 S.Ct. at 2721.

Jett's only application to the instant case merely restated that "'whether a particular official has "final policymaking authority" is a question of state law.'" Id. and ___, 109 S.Ct. at 2723, quoting St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988). Jett was remanded to the Court of Appeals to determine whether a government official possessed final policymaking authority in

light of the Court's rulings in Pembaur and Praprotnik. Here, those factual determinations have already occurred and both courts below have found that the district attorney did not have final policymaking authority for the County Commissioners.

As a final matter, the Court must remember that no local policy or county policy was involved in this matter. The law enforcement officers were merely executing a valid writ pursuant to state law. Local law enforcement officers are "expected to obey the law and ordinarily swear to do so when they take office." Pembaur, 475 U.S. at 486 (White, J., concurring). Both the district judge and district attorney were simply asked to interpret the language of a court order. There was simply no "policymaker" present here. "If deliberate or mistaken acts

like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of respondeat superior and not because the officers' acts represent local policy." Id. Such results would not conform to Monell and Jett.

C. RECENT CASE LAW DOES NOT ALTER THE CORRECTNESS OF THE COURT'S DECISION

Petitioners attack the execution of the writ as an "established state procedure," which deprived them of due process (Pet. 12). Petitioners then attempt to apply the Court's recent pronouncement in Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990). However, the Zinermon Court specifically stated that its opinion did not reach claims of deprivation of due process "by an established state procedure." Id. at ___, 110 S.Ct. at 979, n. 3. Zinermon

reaffirmed that such due process claims are still governed by Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Petitioners' very characterizations of the actions in this case move them outside the ambit of Zinermon.

The Zinermon Court further found Parratt v. Taylor, uncontrolling. Id. at ___, 110 S.Ct. at 989. While Parratt dealt with random and unauthorized acts of state employees, Zinermon reached the issue of accountability of state officials for "abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." Id. at ___, 110 S.Ct. at 989. The Court did not change Parratt's "due process analysis where post deprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged." Id. at

___, 110 S.Ct. 990. Indeed, the dissent argues that Parratt and Hudson, should govern in Zinermon. Id. at ___, 110 S.Ct. at 990 (O'Connor, J., dissenting).

In the instant case, there is simply no broad delegation of power as in Zinermon. Nor is there any showing of abuse of that power. Nothing in Zinermon changes Parratt's ruling concerning the adequacy of state law remedies for deprivation of property rights.

D. RESPONDENTS WEAVER AND NEWTON HAVE ABSOLUTE IMMUNITY IN EXECUTING COURT ORDERS

Even if the Tenth Circuit's ruling were entirely incorrect, a fact which respondents do not begin to concede, respondents have immunity in executing court orders. Respondents have raised the immunity issue from the beginning of this lawsuit. Indeed, respondents Weaver and Newton were granted summary judgment

in March, 1990 on the basis of quasi-judicial immunity. As the prevailing party, respondents "may urge any ground in support of the judgment below, whether or not that ground was relied upon or even considered by the court below." United States v. Arthur Young & Co., 465 U.S. 805, 814, n. 12 (1984).

Courts have long "provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process." Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)) (emphasis added). Accordingly, the Court has recognized not only the absolute civil immunity of judges for conduct within their judicial domain, Pierson v. Ray, 386 U.S. 547, 554-55 (1967)), but also the "quasi-judicial"

civil immunity of prosecutors, Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976), grand jurors, Id. at 423, n. 20, witnesses, Briscoe, 460 U.S. at 345-46, and agency officials, Butz, 438 U.S. at 512-13, for acts intertwined with the judicial process.

Deputy Newton was acting pursuant to court order and instructions from Judge Maley in executing the writ. He was thus engaged in acts intertwined with the judicial process. Absolute immunity for those officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their duties without the need to hire permanent legal counsel to interpret every court order which the official must execute. See, Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989), and cases cited therein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1990

APPENDIX

A Order of the United States District Court for the Eastern District of Oklahoma, filed March 15, 1990.

B Judgment of the United States District Court for the Eastern District of Oklahoma, filed March 15, 1990.

C Writ of the District Court In and For Creek County, State of Oklahoma

D Selected Oklahoma Statutes

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

M. FRANK WATSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87-412-C
	)	(Filed
BILL WEAVER, et al.,	)	3-15-90)
	)	
Defendants.	)	

ORDER

Before the Court is the motion for summary judgment of defendants Bill Weaver and Tom Newton. Plaintiffs have not responded to the motion and, pursuant to Rule 14 of the Local Rules, the motion is deemed confessed. However, the Court has independently reviewed the record.

Weaver was at relevant times the Sheriff of Okmulgee County and Newton was the Deputy Sheriff. Armed with a writ of execution issued by a state court judge, movant approached plaintiffs' home and

found it locked. Newton sought guidance from the Okmulgee District Attorney, who told Newton to enter the house. The house was forcibly entered and property of the plaintiffs was taken from the dwelling. Plaintiffs bring this action under 42 U.S.C. §1983.

Movants argue that as officers sworn to execute court orders they are protected by absolute immunity while executing such orders, citing Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989). Upon review, the Court agrees and finds the motion to be well taken.

It is the Order of the Court that the motion for summary judgment of defendants Bill Weaver and Tom Newton is hereby GRANTED.

IT IS SO ORDERED this 15th day of March, 1990.

/s/ H. Dale Cook
H. DALE COOK
United State District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

M. FRANK WATSON, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87-412-C
	)	(Filed
BILL WEAVER, et al.,	)	3-15-90)
	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendants Bill Weaver and Tom Newton, and against plaintiffs.

IT IS SO ORDERED THIS 15th day of March, 1990.

/s/ H. Dale Cook
H. DALE COOK
United State District Judge

APPENDIX C

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY, STATE OF OKLAHOMA

S & T GAS TRANSMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	C-83-664
	)	
M. FRANK WATSON and BETTY L. WATSON, et al.,	)	
	)	
Defendants.	)	

WRIT

STATE OF OKLAHOMA, OKMULGEE COUNTY

STATE OF OKLAHOMA TO THE SHERIFF OF OKMULGEE COUNTY:

WHEREAS, in a certain action lately tried before me, wherein S & T Gas Transmission Company was Plaintiff, and M. Frank Watson, Betty L. Watson and Watson Gathering Systems, Inc. were Defendants, judgment was entered on the 23rd day of April, 1986. Whereas counsel has advised the Court that assistance is needed to execute upon the property of the

aforesaid Defendants. Now, therefore, you are hereby commended [sic] to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated at Exhibit "A" to this Writ.

/s/ John Maley
JOHN MALEY
District Judge

EXHIBIT "A"

Trophys
Madallions
Paintings
Sculptures
Statutes
Cash
Coins
Furs
Jewelry
VCR
Televisions
Stereos
Radios
Christmas Presents
Clocks
Antiques
Silver
China
Crystal
Unnecessary Furnishings
Rugs
Saddles
Bridles
Cars
Computers
Typewriters
Tapes
Records
Movie Equipment and Video
Guns
Recreational Equipment

APPENDIX D

Okla. Const. Art. 7 §7.

§7. District Courts - Jurisdiction - Courts abolished - Transfer of jurisdiction, files, etc.

(a) The State shall be divided by the Legislature into judicial districts, each consisting of an entire county or of contiguous counties. There shall be one District Court for each judicial district, which shall have such number of District Judges, Associate District Judges and Special Judges as may be prescribed by statute. The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article, and such powers of review of administrative action as may be provided by statute. Existing electing districts for all who are or who become District Judges and Associate District Judges under the terms of this Article shall remain as they are constituted for the offices formerly held by such person on the effective date of this Article, until changed by statute. The Legislature may at any time delegate authority to the Supreme Court to designate by court rule the division of the State into districts and the numbers of judges.

Okla. Stat. tit. 19 §215.5 (1981)

§215.5 Advice to county officers

The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

Okla. Stat. tit. 19 §523 (1981)

§523 Failure to make returns - Penalty

Whenever any sheriff shall neglect to make due return of any writ or process delivered to him to be executed, or shall be guilty of any default or misconduct in relation thereto, he shall be liable to a fine or attachment, or both at the discretion of the court, subject to appeal; such fine, however, not to exceed Two Hundred Dollars; and also an action for damages to the party so aggrieved.

Okla. Stat. tit. 20 §92.1 (1981)

§92.1 Judicial districts - District Judges

The state is hereby divided into twenty-six (26) district court judicial districts with the number of authorized districts and district judges to be as

provided in Sections 2 through 27 of this act.

§92.25 District No. 24

The counties of Okfuskee, Okmulgee and Creek. Said district shall have five district judges to be nominated and elected as follows: One candidate to be nominated and elected at large and a legal resident of Okfuskee County; two candidates to be nominated and elected at large and legal residents of Okmulgee County; and two candidates to be nominated and elected at large and legal residents of Creek County, all of whom shall be elected at large.

Okla. Stat. Tit. 31 §1 (Supp. 1989)

HOMESTEAD AND EXEMPTIONS

§1. Property exempt from attachment, execution or other forced sale -- Bankruptcy proceedings

A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:

1. The home of such person, provided that such home is the principal residence of such person;

. . . .

3. All household and kitchen furniture held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

6. Tools, apparatus and books used in any trade or profession of such person or a dependent of such person;

7. All books, portraits and pictures that are held primarily for the personal, family or household use of such person or a dependent of such person;

8. The person's interest, not to exceed Four Thousand Dollars ($4,000) in aggregate value, in wearing apparel that is held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

12. Two horse and two bridles and two saddles, that are held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

14. One gun, that is held primarily for the personal, family or household use of such person or a dependent of such person;

. . . .

18. Seventy-five percent (75%) of all current wages or earnings for personal or professional services earned during the last ninety (90) days, except as provided in Title 12 of the Oklahoma Statutes in garnishment proceedings for collection of child support;

. . . .

B. No natural person residing in this state may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of Section 522 of the Bankruptcy Reform Act of 1978, Public Law 95-598, 11 U.S.C.A. 101 et seq., except as may otherwise be expressly permitted under this title or other statutes of this state.

C. In no event shall any property under paragraph 5 or 6 of subsection A of this section, the total value of which exceeds Five Thousand Dollars ($5,000), of any person residing in this state be deemed exempt.

No. 89-1518

In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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No. 89-1518

In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Bill Weaver, Tom Newton and the Board of Commissioners of Okmulgee County, Oklahomas' statement of the case accurately depicts the proceedings below. (Resp. 5-16). Accordingly, respondents Andrew S. Hartman; Andrew S. Hartman, P.C.; Barkley, Rodolph, White & Hartman ("law firm"); and S & T Gas Transmission Company, Inc. adopt their statement and supplement it with the following.

Petitioners appeal to the Tenth Circuit Court of Appeals challenged only the district court's application of

Parratt v. Taylor, 451 U.S. 527 (1981) to respondents' alleged Fourth Amendment violations. (App. *infra*, 1a-15a). The district court's decision concerning petitioners' due process claims was not questioned. *Id.*

On rehearing, petitioners sought from the court of appeals clarification on the issue of whether the district court's judgment as to respondents Hartman, Weaver and Newton was reversed as to these parties in their individual and official capacities or as to their individual capacities only. (App., *infra*, 16a-18a). Again, no reference was made to petitioners' due process claims. *Id.*

The Tenth Circuit thereafter issued an order denying petitioners' request for rehearing on the merits but clarifying its previous pronouncement by ruling petitioners' Fourth Amendment claims could not be pursued against Hartman's professional corporation or Hartman, Weaver and Newton except in their personal capacities. (Pet. 16a). No reference was made in the order to the respondent law firm, Barkley, Rodolph, White & Hartman, nor did petitioners seek further clarification of the Tenth Circuit's decision as it applied to the law firm. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

The Tenth Circuit did not commit any error nor did it place itself in conflict with other courts of appeal or decisions of this Court, more particularly the recent pronouncement in *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990). The due process issues petitioners seek for review are raised for the first time in this case. These issues have never been addressed by the lower courts

rendering them waived or premature at best. Further, these respondents are entitled to absolute immunity, the same immunity the district court recently afforded to respondents Newton and Weaver, (Resp. 4, 5), which abates the need for this Court to exercise jurisdiction.

I.

THE PETITION FOR CERTIORARI RAISES ISSUES NOT PRESENTED TO NOR CONSIDERED BY THE COURTS BELOW

Petitioners for the first time in this case call into question what they contend to be an "established state procedure" which allows for the "overbroad execution on a judgment . . . with the valid exemptions available only for later assertion." (Pet. 12). They assert the State's failure to establish procedures by which an owner of property [a judgment debtor who has chosen not to post a supersedeas bond] can assert entitlement in the property before it is seized destroys an owner's entitlement without due process. (Pet. 12). At no time in the lower proceedings did the petitioners attack Oklahoma's post judgment levy and execution process. (App. *infra*, 1a-18a).

As a general rule, new questions may not be raised for the first time on Supreme Court review. *DeShaney v. Winnebago County Dept. of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1003 n.2 (1989); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982). An issue raised for the first time by petition for certiorari should not be considered, especially where the petitioner represents to the court of appeals that a different issue would be determinative of the case. *U.S. v.*

Ortiz, 422 U.S. 891, 898 (1975). Even where the issue may have been presented to the district court, this Court does not ordinarily consider issues neither raised before nor considered by the court of appeals. *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners appeal to the Tenth Circuit focused on one issue, the district court's application of *Parratt* to their Fourth Amendment search and seizure claims. (App., *infra*, 1a-15a). No challenge was ever made by petitioners to the district court's findings concerning their due process claims in their brief or request for rehearing filed with the court of appeals. (*Id. infra*, 16a-18a). Petitioners' criticism of the court of appeals' failure to perform a due process scrutiny of an "established state procedure" is therefore unfounded inasmuch as petitioners never raised the issue. (Pet. 11).

Petitioners' argument the lower court did not or could not have properly determined the deprivation of petitioners' property was "random and unauthorized," (Pet. *Id.*), also provides no basis for this Court to grant certiorari for the same reasons as well. The district court's conclusion the acts of Hartman were "random and unauthorized" was never questioned by petitioners in their appeal to the Tenth Circuit. (App. *infra*, 1a-15a). In the past, this Court has declined to review findings of fact upon which both the district court and the court of appeals have agreed. *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980).

II.

THE TENTH CIRCUIT'S RULING IS NOT CONTRARY TO LAW

The Tenth Circuit's decision is not in conflict with the teachings of *Logan v Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan* the complainant was challenging the state system which, by *operation of law*, destroyed his property interest in adjudicatory procedures whenever the Fair Employment Commission failed to convene a timely fact finding conference (emphasis added). There was no claim of a state official's error in implementing state law. *Id.* at 436. Thus, the court was not dealing with a "tortious loss of property as a result of a random and unauthorized act by a state employee . . . not the result of some established state procedure." *Id.* (quoting *Parratt*, 451 U.S. at 541).

Petitioners attempt to apply the *Logan* "established state procedure" analysis to this case by characterizing the due process violations as arising from an allowance at the state level of an overbroad execution of judgments to occur. (Pet. 12). This characterization is misplaced. The alleged due process violations, as documented by the underlying facts and the lower court's ruling, did not arise by operations of law or as a result of an "established state procedure" but from "random and unauthorized" conduct, i.e., the physical entry into a judgment debtor's home, an act not condoned or permitted under Oklahoma law. (Pet. 3a, 9a, 10a). This case thus falls under the parameters of *Parratt*, as opposed to *Logan*.

Further, the recent pronouncement in *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990) does not provide a

basis to reconsider the Tenth Circuit's rulings. Certiorari was granted in *Zinermon* to resolve the conflict over the scope of *Parratt*. *Id*. at 978 n.2. The specific issue reviewed was whether *Parratt* applied in situations where state officials had the state-clothed authority to effect a deprivation as well as the power to prove a hearing before the deprivation process. *Id*. In *Zinermon*, a mental patient was committed into a state institution "without either valid consent or an involuntary placement hearing by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards." *Id*. at 990. Under those circumstances this Court concluded such state officials could not escape liability by invoking *Parratt*, or *Hudson v. Palmer*, 488 U.S. 517 (1984). *Zinermon, supra*.

In so concluding, three reasons were distinguished as to why such a situation was not controlled by either *Parratt* or *Hudson*: (i) *the deprivation complained of was unpredictable* (it was not unforeseeable a person requesting treatment for mental illness might be incapable of formal consent; one could predict at a specific point in the admission process when such a deprivation might occur, the point in time the patient was given an admission form to sign); (ii) *establishment of a predeprivation process is not impossible or absurd* (it is not impossible to insure established involuntary placement procedure is afforded to all patients who are unwilling or unable to give consent; nor is it absurd to suggest had the state limited and guided the power of the state hospital and its staff to admit patients, the deprivation might have been averted); (iii) *conduct of officials not unauthorized in the sense of Parratt* and *Hudson* (employees not only delegated

with authority and power to effect deprivation but delegated with concomitant duty to initiate procedural safeguards set up by state law to guard against unlawful confinement). *Zinermon, supra* at 989, 990.

This case clearly does not fall under the criteria established in *Zinermon*. First, while the state may be able to predict its officials might negligently or even intentionally enter a judgment debtor's home and take personal property, there is no way for the state to know or predict when the deprivations may occur. Second, the nature of this deprivation makes it impossible for the state to provide a hearing to determine whether or not a state employee should engage in negligent or intentional conduct. This would be particularly absurd since such a taking would likely only occur after a judgment had been entered, the debtor had been given the opportunity to post a supersedeas bond to postpone any levy or execution, and a writ of execution had been issued. Third, respondent Hartman as well as Weaver and Newton were not delegated with the authority both to effect the deprivation and to initiate procedural safeguards to preclude it. Therefore, *Parratt* controls.

III.

A PRIVATE LAW FIRM SHOULD NOT BE HELD VICARIOUSLY LIABLE IN 42 U.S.C. § 1983 ACTIONS

The Tenth Circuit, pursuant to petitioners' request for certification of its ruling, ruled the petitioners could not proceed against Hartman's professional corporation. (Pet. 16a). No indication was made as to whether this ruling

applied solely to Andrew S. Hartman, P.C. or the respondent's law firm, Barkley, Rodolph, White & Hartman, an Oklahoma corporation. Although petitioners sought no further clarification of this issue, respondents, for argument sake, assume the Tenth Circuit's reversal of the district court's ruling did not apply to the law firm as well.

The Tenth Circuit's ruling is consistent with its previous ruling in *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988), the language of 42 U.S.C. § 1983 and this Court's interpretation of the Congressional intent behind § 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). A municipal corporation is not subject to § 1983 liability via *respondeat superior* alone. *Id.* This holding should equally apply to private entities which are only saddled with § 1983 liability when they conspire with or act in concert with state officials. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

The specific language of § 1983 and the conclusions drawn by this Court interpreting the Congressional intent exact this conclusion. Section 1983 liability is focused on those persons who "subject, or cause to be subjected," another person to a constitutional deprivation. This Court found this language evincing a Congressional intention to exclude the imposition of vicarious answerability. *Monell, supra* at 691-92. Moreover, this Court observed that the policy considerations underpinning the doctrine of *respondeat superior* insufficient to warrant its integration into the statute. *Id.* at 694. There is nothing in the language of the statute itself or in this Court's reasoning in *Monell* which lends support for distinguishing the case of

a private corporation and incorporating state vicarious liability law into § 1983. Several lower courts have, in fact, chosen not to do so. *Powell v. Shopco Laurel Co.*, 678 F.2d 504 (4th Cir. 1982); *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982); *Iodice's Estate v. Gimbels, Inc.*, 416 F.Supp. 1054 (E.D. N.Y. 1976); *Weiss v. J.C. Penney Co., Inc.*, 414 F.Supp. 52 (N.D. Ill. 1976).

Moreover, resort to a state statute for purposes of establishing a basis for vicarious liability against an entity which did not participate in a civil rights violation where no such basis has been established by Congress is not authorized under the provisions of § 1988. *Moor v. Alameda County*, 411 U.S. 693 (1973). Section 1988 was intended to do nothing more than to explain the source of the law to be applied in actions brought to enforce the substantive provisions of the [Civil Rights] Act not to "authorize the wholesale importation into federal law of state causes of action – not even one purportedly designed for the protection of federal civil rights." *Id.* at 703-04. Accordingly, this Court held in *Moor* that Congress did not intend, as a matter of federal law, to create a substantive right within § 1983 to sue a public entity on the theory of its vicarious liability. *Id.* To impose vicarious liability either through common or statutory law against Hartman's professional corporation or the law firm on the theory of *respondeat superior* would be inconsistent with Congressional intent as well.

IV.

RESPONDENTS ARE ENTITLED TO ABSOLUTE IMMUNITY

On March 15, 1990, the district court granted summary judgment for respondents Weaver and Newton based on the theory of judicial immunity. (Res. 3, 4, 1a-5a). Respondents Hartman, individually; Hartman in his professional capacity; as well as the law firm, have asserted this defense from the outset and in their original motion for summary judgment to the district court. (Pet. 9a). In light of the district court's recent ruling these respondents also intend to immediately reassert the immunity defense in the district court which based its decision on the Tenth Circuit's ruling in *Valdez v. City and County of Denver*, 878 F.2d 1285, 1290 (10th Cir. 1989) (absolute immunity afforded to officials carrying out judicial orders). Respondents maintain this decision is applicable to them as well. Indeed, this Court has suggested as much. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

In *Lugar* the majority opinion noted the problem of holding private individuals liable for invoking seemingly valid state laws subsequently found to be unconstitutional "should be dealt with . . . by establishing an affirmative defense." *Id.* at 942 n.23. The Court then suggested as a defense the qualified immunity defense available to state officials. *Id.* The dissenting opinion expressly provided that a private creditor who invoked a presumptively valid state prejudgment attachment law and the aid of state officials was entitled to assert a good faith defense. *Id.* at 956 n.14.

Several circuits in addition to the Tenth, have extended the immunity defense to private party defendants who received the aid of public officials to attach or garnish a plaintiff's property, the courts concluding private party state actor defendants should not be deprived of the qualified immunity defense. *See, e.g., Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1440-42 (11th Cir. 1987), vacated in part on other grounds, 822 F.2d 998 (11th Cir. 1982), opinion vacated and reh'g granted en banc, 833 F.2d 1436 (11th Cir. 1982); *Watertown Equip. Co. v. Northwest Bank Watertown, N.A.*, 830 F.2d 1487 (8th Cir. 1987); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. La 1982). *See also, Shipley v. First Federal Sav. & Loan Ass'n of Delaware*, 703 F.Supp. 1122 (D. Del. 1988).

Immunity is applicable to Hartman's professional corporation and the law firm as well. The critical factor in the area of § 1983 immunity is not between an employer and individual defendant, but between defendants that are governmental bodies and individuals and other defendants. "Different considerations come into play when governmental rather than personal liability is threatened." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 653 n.37 (1980) as cited in *DeVargas, supra* at 723. Thus, the fact a private party defendant is a corporation should not affect the application of immunity.

As the other respondents have argued, events subsequent to the ruling of the court of appeals may deprive this Court of the need to exercise jurisdiction. *Maher v. Doe*, 432 U.S. 526 (1977). (Res. 5). The district court's conclusion that absolute immunity is applicable to this case in essence renders the due process and *respondeat*

superior issues moot, thus diminishing this Court's need to exercise jurisdiction.

CONCLUSION

Pursuant to the foregoing argument and authorities the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD LERBLANCE, BANKRUPTCY TRUSTEE and BRIAN HARJO WATSON, Appellants, vs. BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE, & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA, Appellees.	)	No. 88-2796

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD LERBLANCE, BANKRUPTCY TRUSTEE and BRIAN HARJO WATSON, Appellants, vs. BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE, & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA, Appellees.	)	No. 88-2796

CERTIFICATION REQUIRED BY 10TH CIR.R 28.2(a)

The undersigned certifies that the following parties and attorneys are now or have been interested in this litigation or any related proceedings. These representations are made to enable judges of the court to evaluate the possible need for disqualification or recusal.

1. There are parties to this appeal whose names are not revealed in the caption of this appeal. Richard Lerblance, the bankruptcy trustee, is trustee for Milburn Frank Watson and Betty L. Watson who have a Chapter 11 bankruptcy proceeding pending in the United States Bankruptcy Court for the Eastern District of Oklahoma. The trustee, Richard Lerblance, is an attorney at Hartshorne, Oklahoma.

2. Since this appeal arose, Richard Lerblance has resigned as trustee of the bankrupt estates and has been replaced by Kenneth G. M. Mather, an attorney having offices in Tulsa, Oklahoma.

3. The appellants are represented by Allen Mitchell, Sapulpa, Oklahoma, and by Ron Wright, Muskogee, Oklahoma.

4. Appellee S & T Gas Transmission Company, Inc. is an Oklahoma corporation which has no parent corporation nor any subsidiary corporations to the knowledge of appellants.

5. Appellees Bill Weaver and Tom Newton are represented by John Butler, attorney in Okmulgee, Oklahoma, and by Gregory D. Nellis, Patricia A. Lamb, and Kevin L. Ward of the law firm of Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux of Tulsa, Oklahoma.

6. Appellee Board of Commissioners of Okmulgee County, Oklahoma, is represented by Gregory D. Nellis, Patricia A. Lamb, and Kevin L. Ward of the law firm of Thomas, Glass, Atkinson, Haskins, Nellis & Bouldreaux [sic] of Tulsa, Oklahoma.

7. Appellees Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Barkley, Rodolph, White & Hartman, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolf, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolf, and Denise G. Hartman, and S & T Gas Transmission Company, Inc. are represented by Murray E. Abowitz of the law firm Abowitz & Welch of Oklahoma City, Oklahoma.

8. The appellees designated as John Doe and Jane Doe were never served with summons.

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Exhibit A: Order, summary judgment for all defendants except Board of Commissioners of Okmulgee County, filed 9/27/88. 10-14

Exhibit B: Judgment for all defendants except Board of Commissioners of Okmulgee County, filed 9/27/88. 15-16

Exhibit C: Order for summary judgment for Board of Commissioners of Okmulgee County, filed 9/27/88. 17-19

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BRIEF OF APPELLANTS

PRELIMINARY STATEMENT OF JURISDICTION

The trial court jurisdiction was invoked under 28 U.S.C. Sections 1331 and 1343 in that this action arose under Title 42 U.S.C. Section 1983 as a claim that appellees and each of them, under color of law, violated the rights of appellants as guaranteed by the laws and Constitutions of the United States and of Oklahoma. Appellants sued under 42 U.S.C. Section 1983 to recover damages arising from violation of appellants' Fourth Amendment rights and to recover damages for trespass and conversion arising under state law.

This Court of Appeals has jurisdiction of this appeal from the final decision of a United States District Court under 28 U.S.C. Section 1291. Final judgment was entered on the District Court docket sheet on September 27, 1988. The notice of appeal was timely filed on October 27, 1988, within 30 days after entry of judgment by the District Court and within the time limit set by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Standard for Review

On appeal, the appeal considers the grant of a summary judgment under the same standard employed by the district court. The review by this court is de novo because the ruling granting summary judgment involves purely legal determinations. A summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The evidence must be viewed in the light most favorable to appellants, against whom summary judgment was entered. (Adapted from *Missouri Pacific Railroad Co. v. Kansas and Electric*, case 87-1103, 10th Cir., December 1, 1988).

Issue for Review

Genuine issues of fact remain to be decided by a jury concerning appellants' claims that they were denied substantive due process and equal protection of the laws

when appellees broke into their dwelling house and removed property, in violation of the Fourth Amendment to the United States Constitution and Title 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This action arose on December 12, 1986, when Andrew S. Hartman, attorney for the judgment debtor S & T Gas Transmission Company, Inc., obtained a writ and caused the sheriff of Okmulgee County to break into the dwelling house of Milburn Frank Watson and Betty L. Watson and carry away property owned by Mr. and Mrs. Watson and their minor son, Brian Harjo Watson. During the pendency of this case Brian Harjo Watson became 18 years old, his age of majority under Oklahoma law.

S & T Gas had received a $1.00 jury verdict in a Creek County trial. On hearing post trial motions the judgment was increased by Judge John Maley to $85,244.11 plus interest of $16,478.97 plus attorney fee judgment in favor of Barkley, Rodolph, White & Hartman for $40,064.13. Entry of this judgment was appealed to the Oklahoma Supreme Court. While the case was on appeal, Barkley, Rodolph, White & Hartman started judicial collection activities, issuing garnishments and executions. Andrew Hartman was a partner in the law firm Barkley, Rodolph, White & Hartman.

The only evidence before the district court was portions of the deposition of Andrew Hartman. Depositions of other witnesses, including Sheriff Weaver, Deputy Sheriff Newton, Judge Maley and the Okmulgee County District Attorney were taken but were not transcribed nor

available before the district court entered summary judgment.

Hartman obtained an ex parte writ from Judge Maley which said in part:

> * * * Now, therefore, you are hereby commended (sic) to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated as Exhibit "A" to this Writ. (Hartman, et al., motion for summary judgment, filed August 26, 1988, attached as Exhibit A).

The writ was delivered to the Okmulgee County Sheriff for service on the Watsons. Hartman accompanied a Deputy Sheriff Newton to the Watson home to serve the writ. The Watsons were not home and their home was locked. Deputy Newton acted on instructions from Judge Maley and the Okmulgee County Assistant District Attorney that minimal force could be used to break into the Watson's home. (Plaintiffs' brief in opposition to defendants' motions for summary judgment filed September 14, 1988, attached deposition pages 71-73).

Deputy Newton broke into the Watson's home. He was accompanied by Hartman who went throughout the home and helped remove property from the home. An inventory of goods removed from the home was prepared. (Hartman, et al., motion for summary judgment, filed August 26, 1988, attached deposition pages 77-83 and 95).

Immediately after this, the Watsons filed a Chapter 11 Bankruptcy action. The goods taken from their home were later returned. The appeal from the entry of judgment notwithstanding the jury verdict was successful.

The judgments entered by Judge Maley were vacated and the original jury verdict of $1.00 was reinstated.

Appellees Andrew Hartman, the law firm Barkley, Rodolph, White & Hartman, Sandra Hartman, Denise G. Hartman and S & T Gas filed a motion for summary judgment. The district court sustained their motion for summary judgment and also *sua sponte* entered judgment for Sheriff Weaver and Deputy Sheriff Newton. Appellants did not contest entry of summary judgment as to Sandra Rodolf and Denise G. Hartman who were not partners in the law firm.

Appellee Board of Commissioners of Okmulgee County, Oklahoma filed a separate motion for summary judgment which was sustained by the district court. This appeal is taken from the judgments of the district court entering summary judgment in favor of appellees and against appellants.

ARGUMENT AND AUTHORITIES

The district court applied to all appellees except the Board of Commissioners of Okmulgee County, the rationale of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The district court held that since entry into a dwelling house was not permitted under Oklahoma law that the action of entry was random and unauthorized, though authorized by Judge Maley and the Okmulgee County Assistant District Attorney. The district court further ruled that Oklahoma courts provide an adequate post-deprivation remedy for trespass and wrongful levy.

The Fourth Amendment to the United States Constitution provides substantive rights and prohibits warrantless entry into a home.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The substantive right to be free from unlawful entry into one's home has been long recognized in English and American law. *Semayne's Case*, (1604) 5 Coke, 91a; Blackstone, "Commentaries on the Laws of England", Vol. 3, pages 414-417; 33 C.J.S., Executions, Section 96, page 242; 30 Am.Jur.2d, Executions, Section 261, page 598; 57 A.L.R., pages 210-211; Okla.Const., Art. II, Sec. 30. There is no authority to break into a dwelling house to seize property under a civil execution. Restatement of Torts, Second, Section 208, page 390; Restatement of Torts, Second, Comment on Section 208(2), pages 392-393. The district court agreed that Oklahoma law does not allow forcible entry into a dwelling to carry out a civil writ of execution.

Parratt involved only a claimed violation of a prisoner's right to procedural due process under the Fourteenth Amendment. *Parratt* involved a suit filed by a state prison inmate who did not receive his hobby kit. The prison officials had signed for the hobby kit, but it was lost and never delivered to the prisoner-plaintiff. The primary issue in *Parratt* was whether the prisoner-plaintiff had suffered a Fourteenth Amendment violation. There was no claim that the prisoner-plaintiff had suffered a Fourth

Amendment violation. The Supreme Court said at 451 U.S., pages 536-537:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of sate [sic] law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law."

The court in *Parratt* concluded that the proper redress for loss of the hobby kit was through the state courts. The Supreme Court established a boundary in Fourteenth Amendment cases stating at 451 U.S., page 544:

> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. * * *

In this case, appellants suffered a Fourth Amendment violation. The appellees did not dispute that Hartman obtained the writ, that Hartman delivered the writ to the Okmulgee County Sheriff, that the sheriff's office was advised by a member of the Okmulgee County District

Attorney's office to break into appellants' dwelling house and remove property listed in the writ (Okmulgee County summary judgment brief, filed August 22, 1988, page 3, paragraph 7; Hartman, et al., summary judgment brief, filed August 26, 1988, page 4, paragraphs 17 and 18).

The court of appeal which have applied *Parratt* to a Fourth Amendment violation have concluded that a Fourth Amendment violation is a substantive constitutional violation which is actionable under Title 42 U.S.C. Section 1983. *Augustine v. Doe*, 740 F.2d 322, 325-326 (5th Cir., 1984); *King v. Massarweh*, 782 F.2d 825, 827-828 (9th Cir., 1986); *Smith v. City of Fontana*, 818 F.2d 1411, 1414-1417 (9th Cir., 1987). The district court noted this principle but declined to apply the principle because this Court of Appeals has not adopted a Fourth Amendment exception to *Parratt*.

The district court entered summary judgment in favor of the Board of Commissioners of Okmulgee County under its analysis of *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir., 1988). The district court found that the Board of Commissioners had no supervisory liability for the actions of Deputy Newton. Liability of Okmulgee County is not predicated on supervisory liability in this case. Appellants claim that the authorizations from Judge Maley, the Okmulgee county District Attorney's office, and Sheriff Weaver instructing Deputy Newton to forcibly enter the Watsons' dwelling house were establishment of policy in this case. Appellants believe that the facts in this case mirror the facts in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986). *Pembaur* is a Fourth Amendment violation case, arising after deputy sheriffs and city

police officers chopped open Pembaur's door at his medical clinic to serve grand jury subpoenae. On the issue of whether the County Prosecutor's statements were "establishment of Policy," the *Pembaur* court said at 106 S. Ct., page 1301:

> We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here. Ohio Rev. Code Ann. Section 309.09 (1979) provides that county officers may "require instruction from (the County Prosecutor) in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authroity [sic] by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decision maker for the county, any theref [sic] Section 1983.

The facts in this appeal are close, if not identical, to those in *Pembaur* for the purpose of asserting claims for a Fourth Amendment violation under Section 1983. Deputy Newton got advice from the District Attorney's office and was told to forcibly enter plaintiff's dwelling house. In *Pembaur* the Supreme Court decided that the County Prosecutor set county policy under the facts in that case.

CONCLUSION

The district court erroneously determined that as a matter of law the appellants had no cause of action against apperllees [sic]. The forcible entry into the Watsons' dwelling house was a substantive violation of appellants' Fourth Amendment rights. Appellees Hartman, the law firm of Barkely, Rodolf, White & Hartman, and Sheriff Weaver and Deputy Newton have liability under Section 1983. When the District Judge and the assistant district attorney instructed Deputy Newton to break into the Watson's dwelling house, they set county policy in this case and Okmulgee County, through the Board of Commissioners, has liability under Section 1983.

The district court decision must be vacated and reversed as to all appellees except Sandra Rodolf and Denise G. Hartman and remanded with instructions to allow this case to proceed to jury trial.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants believe that oral argument would be appropriate and helpful to this Court since the issue of a Fourth Amendment exception to the *Parrati* decision has not been decided in this circuit.

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By /s/ Allen Mitchell

CERTIFICATE

I certify that on December 27, 1988, copies of the above instrument were mailed to the following:

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Kenneth G. M. Mather, 700 Sinclair Building, 6 East 5th Street, Tulsa, OK 74103.

/s/ Allen Mitchell

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,	)	
Plaintiff-Appellants,	)	No. 88-2796
v.	)	(D.C. No. 87-412-C)
BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN P.C., an Oklahoma corporation; BARKLEY, RODOLF WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolf, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolf and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,	)	(E.D. Okla.)
Defendants-Appellees.	)	

PETITION FOR REHEARING
SUGGESTION FOR REHEARING IN BANC

Kenneth G. M. Mather, as Trustee of the Estate in Bankruptcy of M. Frank Watson and Betty L. Watson, and

Brian Harjo Watson, as plaintiff/appellants, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, hereby petition this Court for rehearing *in banc* and show the Court that:

1. The Order and Judgment of this Court dated August 8, 1989, affirmed the judgment of the trial court as to all defendants other than Andrew Hartman, Bill Weaver, and Tom Newton and did not specify whether the trial court's judgment as to defendants Weaver and Newton is reversed as to said defendants in their individual and official capacities, or whether the judgment is reversed as to Weaver and Newton in their individual capacities, only.

2. Rehearing is therefore necessary in order to clarify whether defendants Weaver and Newton remain defendants in the case at bar in their official capacities as well as in their individual capacities.

3. The Order and Judgment of this Court also did not specify whether the judgment of the trial court in favor of defendant Hartman was reversed as to defendant Hartman in his individual capacity only, or whether the judgment was reversed as to his corporate capacity as well, to wit, Andrew S. Hartman, P.C.

4. Rehearing is therefore necessary in order to clarify whether defendant Hartman remains defendant in the case at bar in his corporate capacity, as well as his individual capacity.

5. This Court, in reviewing the judgment of the trial court, properly reviewed the trial court's grant of

summary judgment *de novo*, but misapplied the standard of review.

6. Rehearing is therefore necessary to determine whether the standard of review used by this Court was proper.

7. In ruling that under no theory should plaintiffs' claims proceed against defendant Barkley, Rodolf, White & Hartman, this Court and the trial court apparently misconstrued the applicability of the the [sic] acts of defendant Hartman as a partner of the firm under 42 U.S.C. Sec. 1983.

8. In ruling that under no theory should plaintiffs' claims proceed against defendant Board of Commissioners of Creek County, this Court and the trial court failed to recognize that the Sheriff and deputy Sheriff of Okmulgee County are official county policy makers under the statutes of the State of Oklahoma and the facts of this case, and that the Board of County Commissioners can be held liable for his acts.

STATEMENT IN SUPPORT OF SUGGESTION FOR REHEARING IN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Pembauer [sic] v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

I further express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

1. Whether the grant of authority over the subject of service of civil process under the Oklahoma Statutes to the Sheriff and his deputies of Okmulgee County, together with his statutory responsibility under Oklahoma law for all acts of his duly appointed deputies, create a sufficient causal nexus between the illegal break in under color of State law by an Okmulgee County deputy Sheriff of the dwelling house of plaintiffs and Okmulgee County, through its official policy makers, the Sheriff, his deputies, and therefore render the county liable under the holding of *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

2. Whether under the circumstances of this case, a deputy Sheriff can be construed as a *de facto* policy maker and therefor [sic] render the county liable under the holding of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 454 (1986).

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In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case concerns the violations of petitioners' constitutional rights that occurred when, in order to execute a writ, certain respondents broke into petitioners' home – concededly without legal authority to carry out the writ in that manner[1] – and when certain respondents seized property exempt from execution under state law without any prior opportunity for petitioners to assert their exemption claims.[2] Thus, it is not even remotely true that "the only 'question presented' * * * is whether a board of county commissioners, sheriff, and deputy sheriff may be held liable for carrying out a facially valid writ" (Weaver Br. in Opp. 18).

In our petition, we contended that the court below incorrectly dismissed three distinct claims arising out of two separate constitutional violations. We argued that petitioners have a valid Fourth Amendment claim against respondent Board of County Commissioners of Okmulgee

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[1] See Weaver Br. in Opp. 28 ("attorney Hartman's actions were not the kind of acts contemplated or condoned under Oklahoma law"); Hartman Br. in Opp. 5 ("the physical entry into a judgment debtor's home [was] an act not condoned or permitted under Oklahoma law").

[2] Respondents' contention that the only exempt property seized was a check for $6.67 (Weaver Br. in Opp. 11, 16) is flatly wrong. Oklahoma law provides that, for example, "[o]ne gun," "two bridles and two saddles," and "[a]ll household and kitchen furniture" are exempt from execution. Okla. Stat. tit. 31, § 1(A)(3), (A)(12), (A)(14) (1990 Supp.). And the inventory list attached to the Sheriff's testimony (see Weaver Depo. 31-32) indicates that, for example, guns, bridles, saddles (which the Watsons had earlier identified as their only personal guns, bridles, and saddles), a rug, and a carousel horse were seized.

County (*i.e.*, the county)[3] and respondents Weaver and Newton in their official capacities because Newton broke into their home pursuant to official county policy. We also argued that petitioners have a valid due process claim against all respondents for the seizure of their property in satisfaction of a judgment because they were not first given a hearing on their claim that much of the property was exempt under state law from judgment creditors. Last, we explained that petitioners' claim against respondent law firm for the involvement of one of its partners in the break-in could proceed on the basis of respondeat superior.

Respondents seek to conflate the breaking and entering and the seizure of petitioners' property into a single "event." They then devote most of their efforts to contending that the district court – which resolved this case on summary judgment – found as a factual matter that this "event" was too unconnected with any governmental actor or entity to give rise to official liability on Fourth Amendment grounds and to any liability on due process grounds. The Tenth Circuit's decision, however, rests

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[3] As we pointed out in the petition (Pet. 4 n.3) Oklahoma law provides that "[i]n all suits or proceedings * * * against a county, the name in which a county shall * * * be sued shall be, 'Board of County Commissioners of the County of ___.' " Okla. Stat. tit. 19, § 4 (1988). In view of this explicit directive, respondents' repeated emphasis on the lack of involvement of the Board of County Commissioners *as such* with the events underlying this lawsuit (Weaver Br. in Opp. 12-14, 21, 24) is completely beside the point. The question is whether the county can be held liable under the standards governing county liability, and respondents' assertions that the county commissioners lack power to control the Sheriff (*id.* at 13-14) serve only to *confirm* our submission (Pet. 22, 24) that the Sheriff has sufficient autonomy to be considered a county policymaker, thus subjecting the county to liability.

squarely on legal issues appropriate for review by this Court.

1. Without providing any reason, the Tenth Circuit affirmed the district court's dismissal of petitioners' Fourth Amendment claims against the county and Weaver and Newton in their official capacities. Pet. App. 3a. In our petition, we argued that official liability was proper because the breaking and entering was ordered by the District Attorney and Sheriff for Okmulgee County, each of whom has policymaking authority with respect to execution of writs.

Respondents' attempt to support the Tenth Circuit's disposition in unavailing. They assert that "[p]etitioners have been unable to ever show any official 'policy' on the part of the County Commissioners or the Sheriff which would have authorized or supported the forced entry in this case." Weaver Br. in Opp. 34. But that of course misses the point – this Court has made clear that the "official policy" need not antedate the violation; rather, *the "official policy" may be set by the violation itself if the violation is ordered by the appropriate official.* See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); see also *Jett v. Dallas Independent School Dist.*, 109 S. Ct. 2702, 2723 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion).

In arguing that the breaking and entering was not ordered by policymaking officials, respondents place great weight (Weaver Br. in Opp. 24-25, 38-39) on a supposed "factual" finding by the district court that the action was "random and unauthorized" (Pet. App. 10a). But this case was resolved on summary judgment below; if the issue were indeed one of fact, the record would have to be read in the light most favorable to petitioners. More to the point, the issue is not one of fact. Even if the phrase "random and unauthorized" was the equivalent of a determination that the District Attorney and the Sheriff

are not official policymakers,[4] that determination would be reviewable de novo because it is a "question of *state law*" whether government officials are policymakers. *Jett*, 109 S. Ct. at 2723. And there is no real dispute in this case about the broad authority that state law gives to the District Attorney and the Sheriff; the question presented is whether that authority suffices to make their actions those of policymakers, as *Pembaur* indicates (see Pet. 19-22) and as numerous courts of appeals have held (see Pet. 22-25). That very important issue of federal law – on which the circuits are divided – cannot be obscured by mislabeling the district court's erroneous legal conclusion as a finding of fact.

Respondents last contend that liability is inappropriate under *Pembaur* because the District Attorney is responsible under Oklahoma law only for giving "opinion and advice" to other officials. Weaver Br. in Opp. 35-36.[5] In the first place, this responds only to part of our argument on why *Pembaur* requires reversal. As we pointed out, the *Sheriff* – who is clearly the final decisionmaker for the County in such matters – ordered the break-in. Pet. 22. But official liability is additionally appropriate

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[4] The district court made this finding because it erroneously believed that this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that a Section 1983 action alleging a *due process* violation cannot proceed if the deprivation was "random and unauthorized," applied to Fourth Amendment claims as well. Pet. App. 10a n.1.

[5] Respondents also maintain that the Sheriff contacted the judge who issued the writ and that he ordered the forced entry. Weaver Br. in Opp. 12. The judge, however, testified that he simply referred the Sheriff to the District Attorney when contacted. Maley Depo. 9.

because the District Attorney's role was more than that of a legal advisor. As we acknowledged in our petition, *Pembaur* did imply that mere "legal advice" given by a prosecutor might not constitute official policy (Pet. 20 n.11); however, the Court further noted that where the "advice" is routinely followed, it can nonetheless amount to policy. See 475 U.S. at 485. And respondents nowhere contest our showing that the Sheriff automatically deferred to the District Attorney on these types of matters (Pet. 6-7, 21).

2. The Tenth Circuit dismissed outright petitioners' due process claims against all defendants on the ground that Oklahoma tort law provides postdeprivation remedies and that, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), no federal cause of action consequently existed. Pet. App. 3a. In our petition, we argued that *Parratt* does not govern this case – and that the due process claims are therefore tenable – because the taking of petitioners' property without a meaningful prior hearing on their exemption claims was not random and unauthorized.

Respondents assert that petitioners did not raise before the Tenth Circuit the due process claims now raised in this Court. Weaver Br. in Opp. 19-21; Hartman Br. in Opp. 3-4. When they were before the Tenth Circuit, however, respondents took a different position, asserting that the court *did* have due process issues before it. Weaver C.A. Br. 2 ("Appellees would submit that the issues for review are: 1. Whether the trial court erred in holding that the seizure of appellants' property did not violate *per se* constitutional guarantees of due process? * * * "); Hartman C.A. Br. 9 (on its facts this case "is, if any violation, one of procedural due process to which the *Parratt* doctrine clearly applies"). And the Tenth Circuit certainly did pass on the due process issues. See Pet. App. 3a (affirming summary judgments as to certain defendants in all respects); *id.* at 4a ("[o]n remand, the

district court should consider plaintiffs' fourth amendment claim * * * as it may be intertwined with the fifth amendment claim"); *id.* at 14a ("the directions on remand in the original disposition [are] modified to clarify that appellants may not proceed on their due process claim"). Thus, although respondents contend that petitioners devoted little attention to their due process claim in the court of appeals, the fact remains that that court actually passed on the issue, and the correctness of its decision is properly open to scrutiny here. See *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

On the merits of the due process issue, respondents argue solely that the deprivation was random and unauthorized. But they do not dispute that Oklahoma law provides that some property is exempt from execution, that petitioners had a property right in their exempt property even though a judgment had been entered against them, or that Oklahoma law contemplates the seizure of exempt property without a pre-seizure hearing.[6] Instead, their contention rests entirely on their failure to distinguish the due process aspect of this case from the Fourth Amendment aspect. Thus, they again rely heavily upon the alleged "factual" finding by the district court that the deprivation was random and unauthorized. Weaver Br. in Opp. 24-25, 28, 31, 40-41; Hartman Br. in Opp. 5.

To begin with, the district court *made no such finding*. It determined only that the conduct giving rise to the

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[6] Respondents allude to the state procedure by which petitioners could have avoided the execution by posting a bond, as if it relieves the State from having to provide a predeprivation hearing. Weaver Br. in Opp. 28. This Court, however, has rejected the proposition that a state law provision by which a property owner can avoid a deprivation by posting security excuses the State's failure to provide predeprivation process. See *Bell v. Burson*, 402 U.S. 535, 536 (1971).

Fourth Amendment violation – the breaking and entering – was random and unauthorized. Pet. App. 10a. It made no such finding with respect to the deprivation of petitioners' property without a hearing. Indeed, it dismissed the due process claims on the entirely separate – but still erroneous (see Pet. 11 n.9) – ground that no due process violation occurred because the execution was postjudgment. Pet. App. 9a.

In any event, the question whether a deprivation was random and unauthorized is plainly one of *law* – as discussed above, this Court held last Term in *Jett* (see 109 S. Ct. at 2723) that the related question of whether a government employee may set official policy is one of *"law."* See *Easter House v. Felder*, 879 F.2d 1458, 1480-1481 (7th Cir. 1989) (Easterbrook, J., concurring) (the random and unauthorized issue "has obvious parallels to the question whether the seemingly unauthorized acts of public employees should be attributed to a local government"), vacated and remanded for reconsideration in light of *Zinermon v. Burch*, 110 S. Ct. 1314 (1990). Thus, even had the district court made such a finding, the issue would be one appropriate for this Court's attention.

Last, respondents similarly misconceive petitioners' due process claim in their effort to explain why this Court's intervening decision in *Zinermon v. Burch*, 110 S. Ct. 975 (1990), does not confirm that the Tenth Circuit erred. In *Zinermon*, the Court held that *Parratt* does not control when a deprivation is foreseeable in the sense that it "w[ould] occur, if at all, at a specific, predictable point in the * * * process" (110 S. Ct. at 989), when predeprivation process is not "impossible" (*ibid.*), and when the officials' actions were pursuant to a delegated "power and authority to effect the very deprivation complained of here" (*id.* at 990). See Pet. 14-15.

Respondents first argue that the deprivation here was not foreseeable because "there is no way for the state to know or predict" when "its officials might * * * enter a

judgment debtor's home and take personal property." Hartman Br. in Opp. 7. Petitioners' complaint, however, is not that their property was taken but that it was taken without a meaningful prior hearing on their exemption claims. Such a due process violation plainly "occur[s], if at all, at a specific predictable point in the * * * process" – whenever a writ of execution encompassing personal property is sought after a judgment. Respondents next contend that "the nature of this deprivation makes it impossible for the state to provide a hearing to determine whether or not a state employee should engage in negligent or intentional conduct." *Ibid.* But what petitioners want obviously is not such a whimsical hearing as that. What petitioners want – and what due process requires – is a hearing on whether their property is exempt from execution before it is executed upon. As the parties were in the middle of such a hearing when the deprivation occurred, it cannot seriously be contended that such a hearing was impossible. Finally, respondents baldly assert that this deprivation was not pursuant to delegated authority (*ibid.*), but they make no effort whatever to respond to our showing to the contrary (Pet. 15-16).

3. We argued in our petition that respondent Barkley, Rodolph, White & Hartman could be held vicariously liable in a suit brought under Section 1983 for the actions of respondent Hartman (one of its partners) because Oklahoma partnership law indicates it should be so liable. We explained that, although this Court has held that Section 1983 does not *create* vicarious liability for government entities (see *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)), it has never addressed the question whether Section 1983 *incorporates* state vicarious liability of private entities.

Respondents offer no reason why Section 1983 does not incorporate state partnership law other than the plainly distinguishable decision in *Monell* and scattered decisions relying on *Monell* without analysis. Hartman Br.

in Opp. 7-9. In particular, this Court has long presumed that Section 1983 does incorporate state-law principles (see Pet. 28), and that presumption should apply in this case, yet respondents completely fail to come to grips with it.[7]

4. The district court has recently granted summary judgment to respondents Weaver and Newton in their individual capacities on grounds of "absolute immunity" (the case is still pending against respondent Hartman). Weaver Br. in Opp. App. 1a-3a. Respondents assert that the issues presented in the petition are therefore now moot. Weaver Br. in Opp. 4-5; Hartman Br. in Opp. 11-12. To begin with, however, petitioners intend at the appropriate time to appeal the district court's judgment, which is erroneous.[8] Because there has not yet been a final

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[7] Even if 42 U.S.C. § 1988 provides no basis for vicarious liability in suits brought under Section 1983 (see *Moor v. County of Alameda*, 411 U.S. 693 (1973)), that cannot defeat our more fundamental argument that Section 1983 *incorporates* state vicarious liability law. See Pet. 26-28. Thus, well after the Court gave Section 1988 a narrow construction in *Moor*, it reserved the question whether another provision of the Civil Rights Acts incorporates state vicarious liability law with respect to private defendants. See *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-395 (1982).

[8] The district court's order giving "absolute immunity" to Newton and Weaver for committing a Fourth Amendment violation while carrying out a writ of execution is plainly wrong. The decision on which the district court relied, *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989), provides only that "an official charged with the duty of executing a facially valid court order enjoys absolute immunity * * * in a suit challenging *conduct prescribed by that order.*" 878 F.2d at 1286 (emphasis added). Weaver and Newton were not engaged in "conduct prescribed by" the writ of execution when they took the step – which all concede to be an illegal means of executing a writ – of breaking down the door of the Watsons' home.

adjudication with respect to all defendants or an "express determination" that the partial judgment is final (Fed. R. Civ. P. 54(b)), the time for appeal is not yet running. Moreover, even if the district court's immunity ruling were correct, it would have no bearing whatever on the liability of Okmulgee County – the county has no immunity (see *Owen v. City of Independence*, 445 U.S. 622 (1980)) – or on the separate due process issues presented in the petition. Those issues need to be resolved.

For the foregoing reasons and those given in the petition, the petitioner for a writ of certiorari should be granted.

Respectfully submitted,

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